H.R. 1670, THE FEDERAL ACQUISITION REFORM ACT OF 1995

JOINT HEARING

BEFORE THE

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

AND THE

COMMITTEE ON NATIONAL SECURITY

HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

MAY 25, 1995

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H.R. 1670, THE FEDERAL ACQUISITION REFORM ACT OF 1995

THURSDAY, MAY 25, 1995

HOUSE OF REPRESENTATIVES,
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT, AND
COMMITTEE ON NATIONAL SECURITY,
Washington, DC.

The committees met, pursuant to notice, at 10:07 a.m., in room 2154, Rayburn House Office Building, Hon. William F. Clinger, Jr. (chairman of the Committee on Government Reform and Oversight) presiding.

Government Reform and Oversight Committee members present: Representatives Clinger, Ros-Lehtinen, Zeliff, McHugh, Horn, Mica, Blute, Davis, Fox, Tate, Gutknecht, Bass, LaTourette, Collins of Illinois, Spratt, Kanjorski, Maloney, Taylor, Moran, Green, Meek, and Mascara.

National Security Committee members present: Representatives Spence (chairman), Hunter, Bateman, McHugh, Bartlett, Watts, Longley, Hastings, Montgomery, Skelton, Sisisky, Spratt, Tanner, Taylor, Edwards, Harman, McHale, and Geren.

Government Reform and Oversight Committee staff present: James Clarke, staff director; Ellen Brown, procurement counsel; Kevin Sabo, general counsel; Judith McCoy, chief clerk; Cheri Tillett, assistant chief clerk/calendar clerk; Russell George, staff director/counsel for Subcommittee on Government Management, Information and Technology; Susan Marshall, procurement specialist; Ron Stroman, minority deputy staff director; Dave Schooler, minority chief counsel; Cecelia Morton, minority office manager; Ellen Rayner, minority chief clerk; Cheryl Phelps, minority professional staff; and Miles Romney, minority counsel.

National Security Committee staff present: Robert Rangel, deputy staff director; and Andrea Aquino, staff assistant.

Mr. CLINGER. The Committee on Government Reform and Oversight will convene at this time.

Today, we are looking forward to hearing from many distinguished Government and industry witnesses, individuals who represent a vast breadth of knowledge and wisdom regarding the procurement process.

As you know, in the last Congress we passed the Federal Acquisition Streamlining Act of 1994; and although FASA was considered the most comprehensive procurement reform in more than a decade, FASA went only part of the way in modernizing the system. That is why Chairman Spence and I introduced H.R. 1670, the Federal Acquisition Reform Act of 1995, in order to move the Fed-

eral procurement system closer to a commercial-type process. I want to thank Chairman Spence very profoundly for his dedication and commitment to working with our committee on this critical effort.

I am pleased to note that this is our first joint hearing with the National Security Committee, and I look forward to continuing this atmosphere of cooperation in the future. It has been a wonderful, cooperative effort.

Some may say we should rest on our laurels and let the system absorb the changes made last year by FASA. But, clearly, the system still cries out for fundamental change. Make no mistake, competition is the driving force of our free enterprise system and, consequently, must remain the driver behind our efforts to reform the current Federal procurement process.

Our proposal seeks to allow firms to concentrate their energies and resources on Government business that they can realistically meet by permitting the Government's acquisition professionals to focus competition—in other words, provide meaningful competition, not competition simply for competition's sake.

Our proposal also takes the next logical step in promoting the Government's acquisition of commercial goods and services by seeking to establish more commercial-like procedures which will free businesses from remaining Government data and audit requirements, simplify the sale of commercial items and promote the Government's use of commercial sources.

Simultaneously, the bill eliminates the guesswork from the current bid protest and dispute resolution maze by creating a single administrative entity to handle such matters with a single set of efficient procedures to expedite the process. We have tried to fashion a sensible middle ground between the executive agency's wishes and those of industry.

We will be interested to hear our witnesses' views on that effort.

The bill also promotes better Government/industry relationships by repealing provisions of law that currently impede communication between the Government and industry and fosters long-term relationships with quality suppliers—much like commercial businesses do.

From the time the Second Continental Congress established a Commissary General in 1775, the Federal procurement system has commanded the attention of both public officials and the American taxpayer. In many respects, we still are guided today by the same considerations the Commissary General faced in 1775: how to provide meaningful competition, obtain quality goods at reasonable prices and ensure accountability of public officials for public transactions. And, too, as in 1775, we are under great budgetary constraints that drive us to look at ways to meet our goals yet do so in a way that is affordable and uses common sense. We believe we have done that with this bill.

I look forward to hearing from our witnesses today on this most important effort.

[A copy of H.R. 1670 follows:]

104TH CONGRESS
1ST SESSION

H. R. 1670

To revise and streamline the acquisition laws of the Federal Government, to reorganize the mechanisms for resolving Federal procurement disputes, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 18, 1995

Mr. CLINGER (for himself, Mr. SPENCE, Mr. HORN, Mr. ZELIFF, Mr. BLUTE, Mr. DAVIS, Mr. SCARBOROUGH, Mr. LEWIS of California, Mr. TATE, Mr. TIAHRT, Mr. FLANAGAN, Mr. BASS, and Mr. CHAMBLISS) introduced the following bill; which was referred to the Committee on Government Reform and Oversight, and in addition to the Committees on National Security and the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To revise and streamline the acquisition laws of the Federal Government, to reorganize the mechanisms for resolving Federal procurement disputes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Acquisition Reform Act of 1995".

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

TITLE I—COMPETITION

SEC. 101. IMPROVEMENT OF COMPETITION REQUIREMENTS.

(a) ARMED SERVICES ACQUISITIONS.—(1) Section 2304 of title 10, United States Code, is amended to read as follows:

"§ 2304. Contracts: competition requirements

"(a) MAXIMUM PRACTICABLE COMPETITION.—Except as provided in subsections (b), (c), and (e) and except in the case of procurement procedures otherwise expressly authorized by statute, the head of an agency in conducting a procurement for property or services—

"(1) shall obtain maximum practicable competition through the use of competitive procedures consistent with the need to efficiently fulfill the Government's requirements in accordance with this chapter and the Federal Acquisition Regulation; and

"(2) shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

"(b) EXCLUSION OF PARTICULAR SOURCE.—The head of an agency may provide for the procurement of property or services covered by this chapter using competitive procedures but excluding a particular source in order to establish or maintain an alternative source or sources of supply for that property or service. The Federal Acquisition Regulation shall set forth the circumstances under which a particular source may be excluded pursuant to this subsection.

"(c) EXCLUSION OF CONCERNS OTHER THAN SMALL BUSINESS CONCERNS AND CERTAIN OTHER ENTITIES.—The head of an agency may provide for the procurement of property or services covered by this section using competitive procedures, but excluding concerns other than small business concerns in furtherance of sections 9 and 15 of the Small Business Act (15 U.S.C. 638, 644) and concerns other than small business concerns, historically Black colleges and universities, and minority institutions in furtherance of section 2323 of this title.

"(d) PROCEDURES OTHER THAN COMPETITIVE PROCEDURES.—Procedures other than competitive procedures may be used for purchasing property and services only when the use of competitive procedures is not feasible or appropriate. Each procurement using procedures other than competitive procedures (other than a procurement for commercial items or a procurement in an amount not greater than the simplified acquisition threshold) shall be justified in writing and approved in accordance with the Federal Acquisition Regulation.

"(e) SIMPLIFIED PROCEDURES.—(1) In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the Federal Acquisition Regulation shall provide for special simplified procedures for purchases of property and services for amounts not greater than the simplified acquisition threshold.

"(2) A proposed purchase or contract for an amount above the simplified acquisition threshold may not be divided into several purchases or contracts for lesser amounts in order to use the simplified procedures required by paragraph (1).

"(3) In using simplified procedures, the head of an agency shall ensure that competition is obtained to the extent practicable consistent with the particular Government requirement.

"(f) CERTAIN CONTRACTS.—For the purposes of the following laws, purchases or contracts awarded after using procedures other than sealed-bid procedures shall be treated as if they were made with sealed-bid procedures:

"(1) The Walsh-Healey Act (41 U.S.C. 35–45).

"(2) The Act entitled "An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes", approved March 3, 1931 (commonly referred to as the "Davis-Bacon Act") (40 U.S.C. 276a–276a–5).".

(2) Chapter 137 of title 10, United States Code, is amended by inserting before section 2305 a new section—

(A) the designation and heading for which is as follows:

"§ 2304f. Merit-based selection";

and

(B) the text of which consists of subsection (j) of section 2304 of such title, as in effect on the day before the date of the enactment of this Act, modified—

(i) by striking out the subsection designation and the subsection heading;

(ii) in paragraphs (2)(A), (3), and (4), by striking out "subsection" and inserting in lieu thereof "section" each place it appears;

(iii) in paragraph (2)(C), by striking out "paragraph (1)" and inserting in lieu thereof "subsection (a)";

(iv) by redesignating paragraphs (1), (2), (3), and (4) as subsections (a), (b), (c), and (d), respectively; and

(v) in subsection (b) (as so redesignated), by redesignating subparagraphs (A), (B), and

(C) as paragraphs (1), (2), and (3), respectively.

(3) The table of sections at the beginning of such chapter is amended by inserting before the item relating to section 2305 the following new item:

"2304f. Merit-based selection.".

(b) CIVILIAN AGENCY ACQUISITIONS.—(1) Section 303 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253) is amended to read as follows:

"SEC. 303. CONTRACTS: COMPETITION REQUIREMENTS.

"(a) MAXIMUM PRACTICABLE COMPETITION.—Except as provided in subsections (b), (c), and (e) and except in the case of procurement procedures otherwise expressly authorized by statute, an executive agency in conducting a procurement for property or services—

"(1) shall obtain maximum practicable competition through the use of competitive procedures consistent with the need to efficiently fulfill the Govern-

ment's requirements in accordance with this chapter and the Federal Acquisition Regulation; and

"(2) shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

"(b) EXCLUSION OF PARTICULAR SOURCE.—An executive agency may provide for the procurement of property or services covered by this chapter using competitive procedures but excluding a particular source in order to establish or maintain an alternative source or sources of supply for that property or service. The Federal Acquisition Regulation shall set forth the circumstances under which a particular source may be excluded pursuant to this subsection.

"(c) EXCLUSION OF CONCERNS OTHER THAN SMALL BUSINESS CONCERNS AND CERTAIN OTHER ENTITIES.—An executive agency may provide for the procurement of property or services covered by this section using competitive procedures, but excluding concerns other than small business concerns in furtherance of sections 9 and 15 of the Small Business Act (15 U.S.C. 638, 644) and concerns other than small business concerns, historically Black colleges and universities, and minority institutions in furtherance of section 7102 of the Federal Acquisition Streamlining Act of 1994 (15 U.S.C. 644 note).

"(d) PROCEDURES OTHER THAN COMPETITIVE PROCEDURES.—Procedures other than competitive procedures may be used for purchasing property and services only when the use of competitive procedures is not feasible or appropriate. Each procurement using procedures other than competitive procedures (other than a procurement for commercial items or a procurement in an amount not greater than the simplified acquisition threshold) shall be justified in writing and approved in accordance with the Federal Acquisition Regulation.

"(e) SIMPLIFIED PROCEDURES.—(1) In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the Federal Acquisition Regulation shall provide for special simplified procedures for purchases of property and services for amounts not greater than the simplified acquisition threshold.

"(2)(A) The Administrator of General Services shall prescribe regulations that provide special simplified procedures for acquisitions of leasehold interests in real property at rental rates that do not exceed the simplified acquisition threshold.

"(B) For purposes of subparagraph (A), the rental rate or rates under a multiyear lease do not exceed the simplified acquisition threshold if the average annual amount of the rent payable for the period of the lease does not exceed the simplified acquisition threshold.

"(3) A proposed purchase or contract or for an amount above the simplified acquisition threshold may not be divided into several purchases or contracts for lesser amounts in order to use the simplified procedures required by paragraph (1).

"(4) In using simplified procedures, an executive agency shall ensure that competition is obtained to the extent practicable consistent with the particular Government requirement.".

(2) Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) is amended by inserting after section 303L a new section—

(A) the designation and heading for which is as follows:

"SEC. 303M. MERIT-BASED SELECTION.";

and

(B) the text of which consists of subsection (h) of section 303 of such Act, as in effect on the day before the date of the enactment of this Act, modified—

(i) by striking out the subsection designation and the subsection heading;

(ii) in paragraphs (2)(A), (3), and (4), by striking out "subsection" and inserting in lieu thereof "section" each place it appears;

(iii) in paragraph (2)(C), by striking out "paragraph (1)" and inserting in lieu thereof "subsection (a)";

(iv) by redesignating paragraphs (1), (2), (3), and (4) as subsections (a), (b), (c), and (d), respectively; and

(v) in subsection (b) (as so redesignated), by redesignating subparagraphs (A), (B), and (C) as paragraphs (1), (2), and (3), respectively.

(3) The table of contents for the Federal Property and Administrative Services Act of 1949 (contained in section 1(b)) is amended—

(A) by striking out the item relating to section 303 and inserting in lieu thereof the following:

"Sec. 303. Contracts: competition requirements."; and

(B) by inserting after the item relating to section 303L the following new item:

"Sec. 303M. Merit-based selection.".

(c) REVISIONS TO PROCUREMENT NOTICE PROVISIONS.—Section 18 of the Office of Federal Procurement Policy Act (41 U.S.C. 416) is amended—

(1) in subsection (a)—

(A) in subparagraph (B) of paragraph (1)—

(i) by striking out "subsection (f)—" and all that follows through the end of the subparagraph and inserting in lieu thereof "subsection (b); and"; and

(ii) by inserting after "property or services" the following: "for a price expected to exceed $10,000 but not to exceed $25,000";

(B) by striking out paragraph (4); and

(C) by redesignating paragraphs (5) and (6) as paragraphs (4) and (5), respectively; and

(2) in subsection (b)(4)—

(A) by striking out "all"; and

(B) by striking out "(as appropriate) which shall be considered by the agency".

(d) REPEAL OF DUPLICATIVE PROVISIONS.—Section 8 of the Small Business Act (15 U.S.C. 637) is amended—

(1) by striking out subsections (e), (f), (g), (h), and (i); and

(2) by redesignating subsection (j) as subsection (e).

(e) EXECUTIVE AGENCY RESPONSIBILITIES.—(1) Section 16 of the Office of Federal Procurement Policy Act (41 U.S.C. 414) is amended—

(A) by striking out "achieve" in the matter preceding paragraph (1) and inserting in lieu thereof "promote"; and

(B) by amending paragraph (1) to read as follows:

"(1) to implement maximum practicable competition in the procurement of property or services by the executive agency by establishing policies, procedures, and practices that are consistent with the need to efficiently fulfill the Government's requirements;".

(2) Section 20 of such Act (41 U.S.C. 418) is amended in subsection (a)(2)(A) by striking out "serving in a position authorized for such executive agency on the date of enactment of the Competition in Contracting Act of 1984".

SEC. 102. DEFINITION RELATING TO COMPETITION REQUIREMENTS.

(a) DEFINITION.—Paragraph (6) of section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403) is amended to read as follows:

"(6) The term 'maximum practicable competition', when used with respect to a procurement, means that a maximum number of responsible or verified sources (consistent with the particular Government requirement) are permitted to submit sealed bids or competitive proposals on the procurement.".

(b) CONFORMING AMENDMENTS.—

(1) OFFICE OF FEDERAL PROCUREMENT POLICY ACT.—The Office of Federal Procurement Policy Act is further amended—

(A) in section 4(5), by striking out "full and open" and inserting "maximum practicable"; and

(B) in section 20, by striking out "full and open" and inserting in lieu thereof "maximum practicable" each place it appears in subsection (b)(1), subsection (b)(3)(A), subsection (b)(4)(C), and subsection (c);

(2) TITLE 10.—Title 10, United States Code, is amended—

(A) in section 2302(2), by striking out "pursuant to full and open competition" and inserting in lieu thereof "using maximum practicable competition";

(B) in section 2323(e)(3), by striking out "less than full and open" and inserting in lieu thereof "procedures other than"; and

(C) in each of the following sections, by striking out "full and open" and inserting in lieu thereof "maximum practicable":

(i) Section 2302(3).

(ii) Section 2305(a)(1)(A)(i).

(iii) Section 2305(a)(1)(A)(iii).

(iv) Section 2323(i)(3)(A).

(3) FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT.—Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) is amended—

(A) in section 309(b), by striking out "pursuant to full and open competition" and inserting in lieu thereof "using maximum practicable competition"; and

(B) in each of the following sections, by striking out "full and open" and inserting in lieu thereof "maximum practicable":

(i) Section 303A(a)(1)(A).

(ii) Section 303A(a)(1)(C).

(iii) Section 304B(a)(2)(B).

(iv) Section 309(c)(4).

(4) OTHER LAWS.—(A) Section 7102 of the Federal Acquisition Streamlining Act of 1994 (108 Stat. 3367; 15 U.S.C. 644 note) is amended in subsection (a)(1)(A) by striking out "less than full and open competition" and inserting in lieu thereof "procedures other than competitive procedures".

(B) Section 15(l) of the Small Business Act (15 U.S.C. 644(l)) is amended in paragraph (1) and in paragraph (2)(A) by striking out "full and open" and inserting in lieu thereof "maximum practicable" each place it appears.

SEC. 103. CONTRACT SOLICITATION AMENDMENTS.

(a) ARMED SERVICES ACQUISITIONS.—Section 2305 of title 10, United States Code, is amended—

(1) in subsection (a)(1)—

(A) by striking out subparagraph (B); and

(B) by redesignating subparagraph (C) as subparagraph (B) and in that subparagraph by striking out "subparagraphs (A) and (B)" and inserting in lieu thereof "subparagraph (A)"; and

(2) in subsection (b)(4)(A)(i), by striking out "all" and inserting in lieu thereof "the".

(b) CIVILIAN AGENCY ACQUISITIONS.—(1) Section 303A of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253a) is amended—

(A) by striking out paragraph (2); and

(B) by redesignating paragraph (3) as paragraph (2) and in that paragraph by striking out "paragraphs (1) and (2)" and inserting in lieu thereof "paragraph (1)".

(2) Section 303B(d)(1)(A) of such Act (41 U.S.C. 253b) is amended by striking out "all" and inserting in lieu thereof "the".

SEC. 104. PREAWARD DEBRIEFINGS.

(a) ARMED SERVICES ACQUISITIONS.—Section 2305(b) of title 10, United States Code, is amended—

(1) by striking out subparagraph (F) of paragraph (5);

(2) by redesignating paragraph (6) as paragraph (8); and

(3) by inserting after paragraph (5) the following new paragraphs:

"(6)(A) When the contracting officer excludes an offeror submitting a competitive proposal from the competitive range (or otherwise excludes such an offeror from further consideration prior to the final source selection decision), the excluded offeror may request in writing, within three days after the date on which the excluded offeror receives notice of its exclusion, a debriefing prior to award. The contracting officer shall make every effort to debrief the unsuccessful offeror as soon as practicable and may refuse the request for a debriefing if it is not in the best interests of the Government to conduct a debriefing at that time.

"(B) The contracting officer is required to debrief an excluded offeror in accordance with paragraph (5) of this section only if that offeror requested and was refused a preaward debriefing under subparagraph (A) of this paragraph.

"(C) The debriefing conducted under this subsection shall include—

"(i) the executive agency's evaluation of the significant elements in the offeror's offer;

"(ii) a summary of the rationale for the offeror's exclusion; and

"(iii) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the executive agency.

"(D) The debriefing conducted pursuant to this subsection may not disclose the number or identity of other offerors and shall not disclose information about the content, ranking, or evaluation of other offerors' proposals.

"(7) The contracting officer shall include a summary of any debriefing conducted under paragraph (5) or (6) in the contract file.".

(b) CIVILIAN AGENCY ACQUISITIONS.—Section 303B of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253b) is amended—

(1) by striking out paragraph (6) of subsection (e);

(2) by redesignating subsections (f), (g), (h), and (i) as subsections (h), (i), (j), and (k), respectively; and

(3) by inserting after subsection (e) the following new subsections:

"(f)(1) When the contracting officer excludes an offeror submitting a competitive proposal from the competitive range (or otherwise excludes such an offeror from further consideration prior to the final source selection decision), the excluded offeror may request in writing, within 3 days after the date on which the excluded offeror receives notice of its exclusion, a debriefing prior to award. The contracting officer shall make every effort to debrief the unsuccessful offeror as soon as practicable and may refuse the request for a debriefing if it is not in the best interests of the Government to conduct a debriefing at that time.

"(2) The contracting officer is required to debrief an excluded offeror in accordance with subsection (e) of this section only if that offeror requested and was refused a preaward debriefing under paragraph (1) of this subsection.

"(3) The debriefing conducted under this subsection shall include—

"(A) the executive agency's evaluation of the significant elements in the offeror's offer;

"(B) a summary of the rationale for the offeror's exclusion; and

"(C) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the executive agency.

"(4) The debriefing conducted pursuant to this subsection may not disclose the number or identity of other offerors and shall not disclose information about the content, ranking, or evaluation of other offerors' proposals.

"(g) The contracting officer shall include a summary of the any debriefing conducted under subsection (e) or (f) in the contract file.".

SEC. 105. CONTRACT TYPES.

(a) ARMED SERVICES ACQUISITIONS.—(1) Section 2306 of title 10, United States Code, is amended—

(A) by inserting before the period at the end of subsection (a) the following: ", based on market conditions, established commercial practice (if any) for the product or service being acquired, and sound business judgment";

(B) by striking out subsections (b), (d), (e), (f), and (h); and

(C) by redesignating subsection (g) as subsection (b).

(2) The heading of such section is amended to read as follows:

"§ 2306. Contract types".

(b) CIVILIAN AGENCY ACQUISITIONS.—(1) Section 304 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254) is amended—

(A) by inserting before the period at the end of the first sentence of subsection (a) the following: ", based on market conditions, established commercial practice (if any) for the product or service being acquired, and sound business judgment"; and

(B) by striking out "Every contract award" in the second sentence of subsection (a) and all that follows through the end of the section.

(2) The heading of such section is amended to read as follows:

"SEC. 304. CONTRACT TYPES.".

(c) CONFORMING REPEALS.—(1) Sections 4540, 7212, and 9540 of title 10, United States Code, are repealed.

(2) The table of sections at the beginning of chapter 433 of such title is amended by striking out the item relating to section 4540.

(3) The table of sections at the beginning of chapter 631 of such title is amended by striking out the item relating to section 7212.

(4) The table of sections at the beginning of chapter 933 of such title is amended by striking out the item relating to section 9540.

(d) CIVIL WORKS AUTHORITY.—(1) Chapter 137 of title 10, United States Code, is amended by adding at the end the following new section:

"§ 2332. Contracts for architectural and engineering services and construction design

"The Secretary of Defense and the Secretaries of the military departments may enter into contracts for architectural and engineering services in connection with a military construction or family housing project or for other Department of Defense

or military department purposes. Such contracts shall be awarded in accordance with the Brooks Architect-Engineers Act (40 U.S.C. 541 et seq.).".

(2) The table of sections at the beginning of chapter 137 of such title is amended by adding at the end the following new item:

"2332. Contracts for architectural and engineering services and construction design.".

(3) Section 2855 of such title is repealed. The table of sections at the beginning of chapter 169 of such title is amended by striking out the item relating to such section.

SEC. 106. CONTRACTOR PERFORMANCE.

(a) REQUIREMENT FOR SYSTEM.—The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) is amended by adding at the end the following new section:

"SEC. 35. CONTRACTOR PERFORMANCE.

"(a) VERIFICATION AUTHORIZED.—The Federal Acquisition Regulation shall provide a contractor verification system for the procurement of particular property or services that are procured by executive agencies on a repetitive basis. Under the system, the head of an executive agency—

"(1) shall use competitive procedures to verify contractors as eligible for contracts to furnish such property or services; and

"(2) shall award verifications on the basis of the relative efficiency and effectiveness of the business practices, level of quality, and demonstrated contract performance of the responding contractors with regard to the particular property or services.

"(b) PROCUREMENT FROM VERIFIED CONTRACTORS.—The Federal Acquisition Regulation shall provide procedures under which the head of an executive agency may enter into a contract for a procurement of property or services referred to in subsection (a) on the basis of a competition among contractors verified with respect to such property or services pursuant to that subsection.

"(c) TERMINATION OF VERIFICATION.—The Federal Acquisition Regulation shall provide procedures under which the head of an executive agency—

"(1) may provide for the termination of a verification awarded a contractor under this section upon the expiration of a period specified by the head of an executive agency; and

"(2) may revoke a verification awarded a contractor under this section upon a determination that the quality of performance of the contractor does not meet standards applied by the head of the executive agency as of the time of the revocation decision.".

(b) REPEALS.—Section 2319 of title 10, United States Code, is repealed. Section 303C of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253c) is repealed.

(c) CLERICAL AMENDMENTS.—(1) The table of contents for the Office of Federal Procurement Policy Act (contained in section 1(b)) is amended by adding at the end the following new item:

"Sec. 35. Contractor performance.".

(2) The table of sections at the beginning of chapter 137 of title 10, United States Code, is amended by striking out the item relating to section 2319.

(3) The table of contents for the Federal Property and Administrative Services Act of 1949 (contained in section 1(b)) is amended by striking out the item relating to section 303C.

TITLE II—COMMERCIAL ITEMS

SEC. 201. COMMERCIAL ITEM EXCEPTION TO REQUIREMENT FOR COST OR PRICING DATA AND INFORMATION LIMITATIONS.

(a) ARMED SERVICES ACQUISITIONS.—(1) Subsections (b), (c), and (d) of section 2306a of title 10, United States Code, are amended to read as follows:

"(b) EXCEPTIONS.—

"(1) IN GENERAL.—Submission of cost or pricing data shall not be required under subsection (a) in the case of a contract, a subcontract, or modification of a contract or subcontract—

"(A) for which the price agreed upon is based on—

"(i) adequate price competition; or

"(ii) prices set by law or regulation;

"(B) for the acquisition of a commercial item; or

"(C) in an exceptional case when the head of the procuring activity, without delegation, determines that the requirements of this section may be waived and justifies in writing the reasons for such determination.

"(2) MODIFICATIONS OF CONTRACTS AND SUBCONTRACTS FOR COMMERCIAL ITEMS.—In the case of a modification of a contract or subcontract for a commercial item that is not covered by the exception on the submission of cost or pricing data in paragraph (1)(A) or (1)(B), submission of cost or pricing data shall not be required under subsection (a) if—

"(A) the contract or subcontract being modified is a contract or subcontract for which submission of cost or pricing data may not be required by reason of paragraph (1)(A) or (1)(B); and

"(B) the modification would not change the contract or subcontract, as the case may be, from a contract or subcontract for the acquisition of a commercial item to a contract or subcontract for the acquisition of an item other than a commercial item.

"(c) AUTHORITY TO REQUIRE COST OR PRICING DATA ON BELOW-THRESHOLD CONTRACTS.—(1) Subject to paragraph (2), when cost or pricing data are not required to be submitted by subsection (a) for a contract, subcontract, or modification of a contract or subcontract, such data may nevertheless be required to be submitted by the head of the procuring activity, but only if the head of the procuring activity determines that such data are necessary for the evaluation by the agency of the reasonableness of the price of the contract, subcontract, or modification of a contract or subcontract. In any case in which the head of the procuring activity requires such data to be submitted under this subsection, the head of the procuring activity shall justify in writing the reason for such requirement.

"(2) The head of the procuring activity may not require certified cost or pricing data to be submitted under this paragraph for any contract or subcontract, or modification of a contract or subcontract, covered by the exceptions in subparagraph (A) or (B) of subsection (b)(1).

"(3) The head of a procuring activity may not delegate functions under this paragraph.

"(d) LIMITATIONS ON OTHER INFORMATION.—The Federal Acquisition Regulation shall include the following:

"(1) Provisions concerning the types of information that contracting officers may consider in determining whether the price of a procurement to the Government is fair and reasonable when certified cost or pricing data are not required to be submitted under this section, including appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price of the proposed contract or subcontract for the procurement.

"(2) Reasonable limitations on requests for sales data relating to commercial items.

"(3) A requirement that a contracting officer shall, to the maximum extent practicable, limit the scope of any request for information relating to commercial items from an offeror to only that information that is in the form regularly maintained by the offeror in commercial operations.

"(4) A statement that any information received relating to commercial items that is exempt from disclosure under section 552(b) of title 5 shall not be disclosed by the Federal Government.".

(2) Section 2306a of such title is further amended—

(A) by striking out subsection (h); and

(B) by redesignating subsection (i) as subsection (h).

(3) Section 2375 of title 10, United States Code, is amended by striking out subsection (c).

(b) CIVILIAN AGENCY ACQUISITIONS.—(1) Subsections (b), (c), and (d) of section 304A of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254b) are amended to read as follows:

"(b) EXCEPTIONS.—

"(1) IN GENERAL.—Submission of cost or pricing data shall not be required under subsection (a) in the case of a contract, a subcontract, or a modification of a contract or subcontract—

"(A) for which the price agreed upon is based on—

"(i) adequate price competition; or

"(ii) prices set by law or regulation;

"(B) for the acquisition of a commercial item; or

"(C) in an exceptional case when the head of the procuring activity, without delegation, determines that the requirements of this section may be waived and justifies in writing the reasons for such determination.

"(2) MODIFICATIONS OF CONTRACTS AND SUBCONTRACTS FOR COMMERCIAL ITEMS.—In the case of a modification of a contract or subcontract for a commercial item that is not covered by the exception on the submission of cost or pricing data in paragraph (1)(A) or (1)(B), submission of cost or pricing data shall not be required under subsection (a) if—

"(A) the contract or subcontract being modified is a contract or subcontract for which submission of cost or pricing data may not be required by reason of paragraph (1)(A) or (1)(B); and

"(B) the modification would not change the contract or subcontract, as the case may be, from a contract or subcontract for the acquisition of a commercial item to a contract or subcontract for the acquisition of an item other than a commercial item.

"(c) AUTHORITY TO REQUIRE COST OR PRICING DATA ON BELOW-THRESHOLD CONTRACTS.—(1) Subject to paragraph (2), when cost or pricing data are not required to be submitted by subsection (a) for a contract, subcontract, or modification of a contract or subcontract, such data may nevertheless be required to be submitted by the head of the procuring activity, but only if the head of the procuring activity determines that such data are necessary for the evaluation by the agency of the reasonableness of the price of the contract, subcontract, or modification of a contract or subcontract. In any case in which the head of the procuring activity requires such data to be submitted under this subsection, the head of the procuring activity shall justify in writing the reason for such requirement.

"(2) The head of the procuring activity may not require certified cost or pricing data to be submitted under this paragraph for any contract or subcontract, or modification of a contract or subcontract, covered by the exceptions in subparagraph (A) or (B) of subsection (b)(1).

"(3) The head of a procuring activity may not delegate the functions under this paragraph.

"(d) LIMITATIONS ON OTHER INFORMATION.—The Federal Acquisition Regulation shall include the following:

"(1) Provisions concerning the types of information that contracting officers may consider in determining whether the price of a procurement to the Government is fair and reasonable when certified cost or pricing data are not required to be submitted under this section, including appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price of the proposed contract or subcontract for the procurement.

"(2) Reasonable limitations on requests for sales data relating to commercial items.

"(3) A requirement that a contracting officer shall, to the maximum extent practicable, limit the scope of any request for information relating to commercial items from an offeror to only that information that is in the form regularly maintained by the offeror in commercial operations.

"(4) A statement that any information received relating to commercial items that is exempt from disclosure under section 552(b) of title 5 shall not be disclosed by the Federal Government.".

(2) Section 304A of such Act is further amended—

(A) by striking out subsection (h); and

(B) by redesignating subsection (i) as subsection (h).

SEC. 202. APPLICATION OF SIMPLIFIED PROCEDURES TO COMMERCIAL ITEMS.

(a) ARMED SERVICES ACQUISITIONS.—Section 2304(e)(1) of title 10, United States Code, as added by section 101(a), is amended by inserting after "special simplified procedures" the following: "for purchases of commercial items and".

(b) CIVILIAN AGENCY ACQUISITIONS.—Section 303(e)(1) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253), as added by section 101(b), is amended by inserting after "special simplified procedures" the following: "for purchases of commercial items and".

(c) SIMPLIFIED NOTICE.—Section 18 of the Office of Federal Procurement Policy Act (41 U.S.C. 416) is amended in subsection (a)(5) (as redesignated by section 101(d))—

(1) by striking out "limited"; and

(2) by inserting before "submission" the following: "issuance of solicitations and the".

SEC. 203. AMENDMENT TO DEFINITION OF COMMERCIAL ITEMS.

Section 4(12)(F) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12)(F)) is amended by striking out "catalog".

SEC. 204. INAPPLICABILITY OF COST ACCOUNTING STANDARDS TO CONTRACTS AND SUBCONTRACTS FOR COMMERCIAL ITEMS.

Subparagraph (B) of section 26(f)(2) of the Office of Federal Procurement Policy Act (41 U.S.C. 422(f)(2)) is amended—

(1) by striking out clause (i) and inserting in lieu thereof the following:

"(i) Contracts or subcontracts for the acquisition of commercial items."; and

(2) by striking out clause (iii).

TITLE III—ADDITIONAL REFORM PROVISIONS

SEC. 301. GOVERNMENT RELIANCE ON THE PRIVATE SECTOR.

(a) GOVERNMENT RELIANCE ON THE PRIVATE SECTOR.—The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) is amended by inserting after section 16 the following new section:

"SEC. 17. GOVERNMENT RELIANCE ON THE PRIVATE SECTOR.

"It has been and continues to be the policy of the Federal Government to rely on commercial sources to supply the products and services the Federal Government needs.".

(b) CLERICAL AMENDMENT.—The table of contents for the Office of Federal Procurement Policy Act (contained in section 1(b)) is amended by inserting after the item relating to section 16 the following new item:

"Sec. 17. Government reliance on the private sector.".

SEC. 302. ELIMINATION OF CERTAIN CERTIFICATION REQUIREMENTS.

(a) ELIMINATION OF CERTAIN STATUTORY CERTIFICATION REQUIREMENTS.—(1)(A) Section 2410 of title 10, United States Code, is amended—

(i) in the heading, by striking out "**: certification**"; and

(ii) in subsection (a)—

(I) in the heading, by striking out "CERTIFICATION";

(II) by striking out "unless" and all that follows through "that—" and inserting in lieu thereof "unless—"; and

(III) in paragraph (2), by striking out "to the best of that person's knowledge and belief".

(B) The item relating to section 2410 in the table of sections at the beginning of chapter 141 of such title is amended to read as follows:

"Sec. 2410. Requests for equitable adjustment or other relief.".

(2) Section 2410b of title 10, United States Code, is amended in paragraph (2) by striking out "certification and".

(3) Section 1352(b)(2) of title 31, United States Code, is amended—

(A) by striking out subparagraph (C); and

(B) by inserting "and" after the semicolon at the end of subparagraph (A).

(4) Section 5152 of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701) is amended—

(A) in subsection (a)(1), by striking out "has certified to the contracting agency that it will" and inserting in lieu thereof "agrees to";

(B) in subsection (a)(2), by striking out "contract includes a certification by the individual" and inserting in lieu thereof "individual agrees"; and

(C) in subsection (b)(1)—

(i) by striking out subparagraph (A);

(ii) by redesignating subparagraph (B) as subparagraph (A) and in that subparagraph by striking out "such certification by failing to carry out"; and

(iii) by redesignating subparagraph (C) as subparagraph (B).

(b) ELIMINATION OF CERTAIN REGULATORY CERTIFICATION REQUIREMENTS.—

(1) CURRENT CERTIFICATION REQUIREMENTS.—Not later than 210 days after the date of the enactment of this Act, any certification required of contractors or offerors by the Federal Acquisition Regulation or an executive agency procurement regulation that is not specifically imposed by statute shall be removed by the Administrator for Federal Procurement Policy from the Federal Acquisition Regulation or such agency regulation unless—

(A) written justification for such certification is provided to the Administrator by the Federal Acquisition Regulatory Council (in the case of a cer-

tification in the Federal Acquisition Regulation) or the head of an executive agency (in the case of a certification in an executive agency procurement regulation); and

(B) the Administrator approves in writing the retention of such certification.

(2) FUTURE CERTIFICATION REQUIREMENTS.—(A) Section 29 of the Office of Federal Procurement Policy Act (41 U.S.C. 425) is amended—

(i) by amending the heading to read as follows:

"SEC. 22. CONTRACT CLAUSES AND CERTIFICATIONS.";

(ii) by inserting "(a) NONSTANDARD CONTRACT CLAUSES.—" before "The Federal Acquisition"; and

(iii) by adding at the end the following new subsection:

"(b) PROHIBITION ON CERTIFICATION REQUIREMENTS.—A requirement for a certification by a contractor or offeror may not be included in the Federal Acquisition Regulation or an executive agency procurement regulation unless—

"(1) the certification is specifically imposed by statute; or

"(2) written justification for such certification is provided to the Administrator for Federal Procurement Policy by the Federal Acquisition Regulatory Council (in the case of a certification in the Federal Acquisition Regulation) or the head of an executive agency (in the case of a certification in an executive agency procurement regulation), and the Administrator approves in writing the inclusion of such certification.".

(B) The item relating to section 29 in the table of contents for the Office of Federal Procurement Policy Act (contained in section 1(b)) (41 U.S.C. 401 note) is amended to read as follows:

"Sec. 29. Contract clauses and certifications.".

SEC. 303. AMENDMENT TO COMMENCEMENT AND EXPIRATION OF AUTHORITY TO CONDUCT CERTAIN TESTS OF PROCUREMENT PROCEDURES.

Subsection (j) of section 5061 of the Federal Acquisition Streamlining Act of 1994 (41 U.S.C. 413 note) is amended to read as follows:

"(j) COMMENCEMENT AND EXPIRATION OF AUTHORITY.—The authority to conduct a test under subsection (a) in an agency and to award contracts under such a test shall take effect on August 1, 1995, and shall expire on August 1, 2000. Contracts entered into before such authority expires in an agency pursuant to a test shall remain in effect, notwithstanding the expiration of the authority to conduct the test under this section.".

SEC. 304. INTERNATIONAL COMPETITIVENESS.

(a) REPEAL OF PROVISION RELATING TO RESEARCH, DEVELOPMENT, AND PRODUCTION COSTS.—Section 21(e) of the Arms Export Control Act (22 U.S.C. 2761(e)) is amended—

(1) by inserting "and" after the semicolon at the end of paragraph (1)(A);

(2) by striking out subparagraph (B) of paragraph (1);

(3) by redesignating subparagraph (C) of paragraph (1) as subparagraph (B);

(4) by striking out paragraph (2); and

(5) by redesignating paragraph (3) as paragraph (2).

(b) EFFECTIVE DATE.—The amendments made by subsection (a) shall be effective with respect to sales agreements pursuant to sections 21 and 22 of the Arms Export Control Act (22 U.S.C. 2761 and 2762) entered into on or after the date of the enactment of this Act.

SEC. 305. PROCUREMENT INTEGRITY.

(a) AMENDMENT OF PROCUREMENT INTEGRITY PROVISION.—Section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423) is amended to read as follows:

"SEC. 27. RESTRICTIONS ON DISCLOSING AND OBTAINING CONTRACTOR BID OR PROPOSAL INFORMATION OR SOURCE SELECTION INFORMATION.

"(a) PROHIBITION ON DISCLOSING PROCUREMENT INFORMATION.—(1) A person described in paragraph (2) shall not, other than as provided by law, knowingly and willfully disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.

"(2) Paragraph (1) applies to any person who—

"(A) is a present or former officer or employee of the United States, or a person who is acting or has acted for or on behalf of, or who is advising or has advised the United States with respect to, a Federal agency procurement; and

"(B) by virtue of that office, employment, or relationship has or had access to contractor bid or proposal information or source selection information.

"(b) PROHIBITION ON OBTAINING PROCUREMENT INFORMATION.—A person shall not, other than as provided by law, knowingly and willfully obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.

"(c) PROHIBITION ON DISCLOSING OR OBTAINING PROCUREMENT INFORMATION IN CONNECTION WITH A PROTEST.—(1) A person shall not, other than as provided by law, knowingly and willfully violate the terms of a protective order described in paragraph (2) by disclosing or obtaining contractor bid or proposal information or source selection information related to the procurement contract concerned.

"(2) Paragraph (1) applies to any protective order issued by the Comptroller General or the board of contract appeals of the General Services Administration in connection with a protest against the award or proposed award of a Federal agency procurement contract.

"(d) PENALTIES AND ADMINISTRATIVE ACTIONS.—

"(1) CRIMINAL PENALTIES.—

"(A) Whoever engages in conduct constituting an offense under subsection (a), (b), or (c) shall be imprisoned for not more than one year or fined as provided under title 18, United States Code, or both.

"(B) Whoever engages in conduct constituting an offense under subsection (a), (b), or (c) for the purpose of either—

"(i) exchanging the information covered by such subsection for anything of value, or

"(ii) obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract,

shall be imprisoned for not more than five years or fined as provided under title 18, United States Code, or both.

"(2) CIVIL PENALTIES.—The Attorney General may bring a civil action in the appropriate United States district court against any person who engages in conduct constituting an offense under subsection (a), (b), or (c). Upon proof of such conduct by a preponderance of the evidence, the person is subject to a civil penalty. An individual who engages in such conduct is subject to a civil penalty of not more than $50,000 for each violation plus twice the amount of compensation which the individual received or offered for the prohibited conduct. An organization that engages in such conduct is subject to a civil penalty of not more than $500,000 for each violation plus twice the amount of compensation which the organization received or offered for the prohibited conduct.

"(3) ADMINISTRATIVE ACTIONS.—(A) If a Federal agency receives information that a contractor or a person has engaged in conduct constituting an offense under subsection (a), (b), or (c), the Federal agency shall consider taking one or more of the following actions, as appropriate:

"(i) Cancellation of the Federal agency procurement, if a contract has not yet been awarded.

"(ii) Rescission of a contract with respect to which—

"(I) the contractor or someone acting for the contractor has been convicted for an offense under subsection (a), (b), or (c), or

"(II) the head of the agency that awarded the contract has determined, based upon clear and convincing evidence, that the contractor or someone acting for the contractor has engaged in conduct constituting such an offense.

"(iii) Initiation of suspension or debarment proceedings for the protection of the Government in accordance with procedures in the Federal Acquisition Regulation.

"(iv) Initiation of adverse personnel action, pursuant to the procedures in chapter 75 of title 5, United States Code, or other applicable law or regulation.

"(B) If a Federal agency rescinds a contract pursuant to subparagraph (A)(ii), the United States is entitled to recover, in addition to any penalty prescribed by law, the amount expended under the contract.

"(C) For purposes of any suspension or debarment proceedings initiated pursuant to subparagraph (A)(iii), engaging in conduct constituting an offense under subsection (a), (b), or (c) affects the present responsibility of a Government contractor or subcontractor.

"(e) DEFINITIONS.—As used in this section:

"(1) The term 'contractor bid or proposal information' means any of the following information submitted to a Federal agency as part of or in connection with a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

"(A) Cost or pricing data (as defined by section 2306a(i) of title 10, United States Code, with respect to procurements subject to that section, and section 304A(i) of Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254b(i), with respect to procurements subject to that section).

"(B) Indirect costs and direct labor rates.

"(C) Proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation.

"(D) Information marked by the contractor as 'contractor bid or proposal information', in accordance with applicable law or regulation.

"(2) The term 'source selection information' means any of the following information prepared for use by a Federal agency for the purpose of evaluating a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

"(A) Bid prices submitted in response to a Federal agency solicitation for sealed bids, or lists of those bid prices before public bid opening.

"(B) Proposed costs or prices submitted in response to a Federal agency solicitation, or lists of those proposed costs or prices.

"(C) Source selection plans.

"(D) Technical evaluation plans.

"(E) Technical evaluations of proposals.

"(F) Cost or price evaluations of proposals.

"(G) Competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract.

"(H) Rankings of bids, proposals, or competitors.

"(I) The reports and evaluations of source selection panels, boards, or advisory councils.

"(J) Other information marked as 'source selection information' based on a case-by-case determination by the head of the agency, his designee, or the contracting officer that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.

"(3) The term 'Federal agency' has the meaning provided such term in section 3 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 472).

"(4) The term 'Federal agency procurement' means the acquisition (by using competitive procedures and awarding a contract) of goods or services (including construction) from non-Federal sources by a Federal agency using appropriated funds.

"(5) The term 'contracting officer' means a person who, by appointment in accordance with applicable regulations, has the authority to enter into a Federal agency procurement contract on behalf of the Government and to make determinations and findings with respect to such a contract.

"(6) The term 'protest' means a written objection by an interested party to the award or proposed award of a Federal agency procurement contract, pursuant to title IV of the Federal Acquisition Reform Act of 1995.

"(f) LIMITATION ON PROTESTS.—No person may file a protest against the award or proposed award of a Federal agency procurement contract alleging an offense under subsection (a), (b), or (c), of this section, nor may the Comptroller General or the board of contract appeals of the General Services Administration consider such an allegation in deciding a protest, unless that person reported to the Federal agency responsible for the procurement information that the person believed constituted evidence of the offense no later than 14 days after the person first discovered the possible offense.

"(g) SAVINGS PROVISIONS.—This section does not—

"(1) restrict the disclosure of information to, or its receipt by, any person or class of persons authorized, in accordance with applicable agency regulations or procedures, to receive that information;

"(2) restrict a contractor from disclosing its own bid or proposal information or the recipient from receiving that information;

"(3) restrict the disclosure or receipt of information relating to a Federal agency procurement after it has been canceled by the Federal agency before contract award unless the Federal agency plans to resume the procurement;

"(4) authorize the withholding of information from, nor restrict its receipt by, Congress, a committee or subcommittee of Congress, the Comptroller General, a Federal agency, or an inspector general of a Federal agency;

"(5) authorize the withholding of information from, nor restrict its receipt by, any board of contract appeals of a Federal agency or the Comptroller General in the course of a protest against the award or proposed award of a Federal agency procurement contract; or

"(6) limit the applicability of any requirements, sanctions, contract penalties, and remedies established under any other law or regulation.".

(b) REPEALS.—The following provisions of law are repealed:

(1) Sections 2397, 2397a, 2397b, and 2397c of title 10, United States Code.

(2) Section 33 of the Federal Energy Administration Act of 1974 (15 U.S.C. 789).

(3) Section 281 of title 18, United States Code.

(4) Subsection (c) of section 32 of the Office of Federal Procurement Policy Act (41 U.S.C. 428).

(5) The first section 19 of the Federal Nonnuclear Energy Research and Development Act of 1974 (42 U.S.C. 5918).

(c) CLERICAL AMENDMENTS.—

(1) The table of sections at the beginning of chapter 141 of title 10, United States Code, is amended by striking out the items relating to sections 2397, 2397a, 2397b, and 2397c.

(2) The table of sections at the beginning of chapter 15 of title 18, United States Code, is amended by striking out the item relating to section 281.

(3) Section 32 of the Office of Federal Procurement Policy Act (41 U.S.C. 428) is amended by redesignating subsections (d), (e), (f), and (g) as subsections (c), (d), (e), and (f), respectively.

SEC. 306. FURTHER ACQUISITION STREAMLINING PROVISIONS.

(a) PURPOSE OF OFFICE OF FEDERAL PROCUREMENT POLICY.—(1) Section 5(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 404) is amended to read as follows:

"(a) To promote economy, efficiency, and effectiveness in the procurement of property and services by the executive branch of the Federal Government, there shall be an Office of Federal Procurement Policy (hereinafter referred to as the 'Office') in the Office of Management and Budget to provide overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies.".

(2) Sections 2 and 3 of such Act (41 U.S.C. 401 and 402) are repealed.

(b) REPEAL OF REPORT REQUIREMENT.—Section 8 of the Office of Federal Procurement Policy Act (41 U.S.C. 407) is repealed.

(c) REPEAL OF OBSOLETE PROVISIONS.—(1) Sections 10 and 11 of the Office of Federal Procurement Policy Act (41 U.S.C. 409 and 410) are repealed.

(d) CLERICAL AMENDMENTS.—The table of contents for the Office of Federal Procurement Policy Act (contained in section 1(b)) is amended by striking out the items relating to sections 2, 3, 8, 10, and 11.

TITLE IV—STREAMLINING OF DISPUTE RESOLUTION

Subtitle A—General Provisions

SEC. 401. DEFINITIONS.

In this title:

(1) The term "Board" means the United States Board of Contract Appeals.

(2) The term "Board judge" means a member of the United States Board of Contract Appeals.

(3) The term "Chairman" means the Chairman of the United States Board of Contract Appeals.

(4) The term "executive agency" has the meaning given by section 2(2) of the Contract Disputes Act of 1978 (41 U.S.C. 601(2)).

(5) The term "alternative means of dispute resolution" has the meaning given by section 571(3) of title 5, United States Code.

(6) The term "protest" means a written objection by an interested party to any of the following:

(A) A solicitation or other request by an executive agency for offers for a contract for the procurement of property or services.

(B) The cancellation of such a solicitation or other request.

(C) An award or proposed award of such a contract.

(D) A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

(7) The term "interested party", with respect to a contract or a solicitation or other request for offers, means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.

(8) The term "prevailing party", with respect to a determination of the Board under subsection 424(b) that a decision of a contracting officer violates a statute or regulation, means a party that demonstrated such violation.

Subtitle B—Establishment of the United States Board of Contract Appeals

SEC. 411. ESTABLISHMENT.

There is established in the executive branch of the Government an independent establishment to be known as the United States Board of Contract Appeals.

SEC. 412. MEMBERSHIP.

(a) APPOINTMENT.—(1) The Board shall consist of Board judges appointed by the Chairman, without regard to political affiliation and solely on the basis of the professional qualifications required to perform the duties and responsibilities of a Board judge, from a register of applicants maintained by the Board.

(2) The members of the Board shall be selected and appointed to serve in the same manner as administrative law judges appointed pursuant to section 3105 of title 5, United States Code, with an additional requirement that such members shall have had not fewer than five years' experience in public contract law.

(3) Notwithstanding paragraph (2), the following persons shall be considered qualified to serve as Board judges:

(A) Any full-time member of an agency board of contract appeals serving as such on the day before the effective date of this title.

(B) Any person serving on the day before the effective date of this title in a position at a level of assistant general counsel or higher with authority delegated from the Comptroller General to decide bid protests under subchapter V of chapter 35 of title 31, United States Code.

(b) REMOVAL.—Members of the Board shall be subject to removal in the same manner as administrative law judges, as provided in section 7521 of title 5, United States Code.

(c) COMPENSATION.—Compensation for the Chairman and all other members of the Board shall be determined under section 5273a of title 5, United States Code.

SEC. 413. CHAIRMAN.

(a) DESIGNATION.—(1) The Chairman shall be designated by the President to serve for a term of five years. The President shall select the Chairman from among sitting Board judges each of whom has had at least five years of service—

(A) as a member of an agency board of contract appeals; or

(B) in a position at a level of assistant general counsel or higher with authority delegated from the Comptroller General to decide bid protests under subchapter V of chapter 35 of title 31, United States Code (as in effect on the day before the effective date of this title).

(2) A Chairman may continue to serve after the expiration of the Chairman's term until a successor has taken office. A Chairman may be reappointed any number of times.

(b) RESPONSIBILITIES.—The Chairman shall be responsible on behalf of the Board for the executive and administrative operation of the Board, including functions of the Board with respect to the following:

(1) The selection, appointment, and fixing of the compensation of such personnel, pursuant to part III of title 5, United States Code, as the Chairman considers necessary or appropriate, including a Clerk of the Board, a General Counsel, and clerical and legal assistance for Board judges.

(2) The supervision of personnel employed by or assigned to the Board, and the distribution of work among such personnel.

(3) The response to any request that may be made by Congress or the Office of Management and Budget.

(4) The allocation of funds among the various functions of the Board.

(5) The entering into and performance of such contracts, leases, cooperative agreements, or other similar transactions with public agencies and private organizations and persons, and the making of such payments, as the Chairman considers necessary or appropriate to carry out functions vested in the Board.

(6) The operation of an Office of the Clerk of the Board, including the receipt of all filings made with the Board, the assignment of cases, and the maintenance of all records of the Board.

(7) The acquisition, operation, and maintenance of such automatic data processing resources as may be needed by the Board.

(8) The prescription of such rules and regulations as the Chairman considers necessary or appropriate for the administration and management of the Board.

(c) VICE CHAIRMEN.—The Chairman may designate up to four other Board judges as Vice Chairmen. The Chairman may divide the Board into two or more divisions, and, if such division is made, shall assign a Vice Chairman to head each division. The Vice Chairmen, in the order designated by the Chairman, shall act in the place and stead of the Chairman during the absence of the Chairman.

SEC. 414. RULEMAKING AUTHORITY.

(a) IN GENERAL.—The Board may establish—

(1) such procedural rules and regulations as are necessary to the exercise of its functions, including internal rules for the assignment of cases; and

(2) statements of policy of general applicability with respect to its functions.

(b) PROHIBITION ON REVIEW BY OTHER AGENCY OR PERSON.—Rules and regulations established by the Board (including forms which are a part thereof) shall not be subject to review by any other agency or person (including the Administrator of Information and Regulatory Affairs, pursuant to chapter 35 of title 44, United States Code) in advance of publication.

SEC. 415. LITIGATION AUTHORITY.

Except as provided in section 518 of title 28, United States Code, relating to litigation before the Supreme Court, attorneys designated by the Chairman may appear for, and represent the Board in, any civil action brought in connection with any function carried out by the Board.

SEC. 416. SEAL OF BOARD.

The Chairman shall cause a seal of office to be made for the Board of such design as the Board shall approve. Judicial notice shall be taken of such seal.

SEC. 417. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated for fiscal year 1997 and each succeeding fiscal year such sums as may be necessary to carry out the provisions of this title and to enable the Board to perform its functions. Funds appropriate pursuant to this section shall remain available until expended.

Subtitle C—Functions of United States Board of Contract Appeals

SEC. 421. ALTERNATIVE DISPUTE RESOLUTION SERVICES.

(a) REQUIREMENT TO PROVIDE SERVICES UPON REQUEST.—The Board shall provide alternative means of dispute resolution for any disagreement regarding a contract or prospective contract upon the request of all parties to the disagreement.

(b) PERSONNEL QUALIFIED TO ACT.—Each Board judge and each attorney employed by the Board shall be considered to be qualified to act for the purpose of conducting alternative means of dispute resolution under this section.

(c) SERVICES TO BE PROVIDED WITHOUT CHARGE.—Any services provided by the Board or any Board judge or employee pursuant to this section shall be provided without charge.

(d) RECUSAL OF CERTAIN PERSONNEL UPON REQUEST.—In the event that a matter which is presented to the Board for alternative means of dispute resolution, pursuant to this section, later becomes the subject of formal proceedings before the Board, any Board judge or employee who was involved in the alternative means shall, if requested by any party to the formal proceeding, take no part in that proceeding.

SEC. 422. ALTERNATIVE DISPUTE RESOLUTION OF DISPUTES AND PROTESTS SUBMITTED TO BOARD.

With reasonable promptness after the submission to the Board of a contract dispute under section 423 or a bid protest under section 424, a Board judge to whom

the contract dispute or protest is assigned shall request the parties to meet with a Board judge, or an attorney employed by the Board, for the purpose of attempting to resolve the dispute or protest through alternative means of dispute resolution. Formal proceedings in the appeal shall then be suspended until such time as any party or a Board judge to whom the dispute or protest is assigned determines that alternative means of dispute resolution are not appropriate for resolution of the dispute or protest.

SEC. 423. CONTRACT DISPUTES.

The Board shall have jurisdiction as provided by section 8(a) of the Contract Disputes Act of 1978 (41 U.S.C. 601–613).

SEC. 424. PROTESTS.

(a) REVIEW REQUIRED UPON REQUEST.—Upon request of an interested party in connection with any procurement conducted by any executive agency, the Board shall review, as provided in this section, any decision by a contracting officer alleged to violate a statute or regulation. The authority of the Board to conduct such review shall include the authority to review regulations to determine their consistency with applicable statutes. A decision or order of the Board pursuant to this section shall not be subject to interlocutory appeal or review.

(b) STANDARD OF REVIEW.—In deciding a protest, the Board may consider all evidence that is relevant to the decision under protest. It shall accord a presumption of correctness to all facts found and determinations made by the contracting officer whose decision is being protested. The protester may rebut this presumption by showing, by a preponderance of the evidence, that a finding or determination was incorrect. The Board may find that a decision by a contracting officer violates a statute or regulation for any of the reasons stated in section 706(2) of title 5, United States Code.

(c) DETERMINATION OF WHETHER TO SUSPEND AUTHORITY TO CONDUCT PROCUREMENT IN PROTEST FILED BEFORE CONTRACT AWARD.—(1) When a protest under this section is filed before the award of a contract in a protested procurement, the Board, at the request of an interested party and within 10 days after the submission of the protest, shall hold a hearing to determine whether the Board should suspend the authority of the executive agency involved (or its head) to conduct such procurement until the Board can decide the protest.

(2) The Board shall suspend the authority of the executive agency (or its head) unless the agency concerned establishes that—

(A) absent action by the Board, contract award is likely to occur within 30 days after the hearing; and

(B) urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Board.

(3) A suspension under paragraph (2) shall not preclude the executive agency concerned from continuing the procurement process up to but not including award of the contract unless the Board determines such action is not in the best interests of the United States.

(d) DETERMINATION OF WHETHER TO SUSPEND AUTHORITY TO CONDUCT PROCUREMENT IN PROTEST FILED AFTER CONTRACT AWARD.—(1) If, with respect to an award of a contract, the Board receives notice of a protest under this section within the period described in paragraph (2), the Board shall, at the request of an interested party, hold a hearing to determine whether the Board should suspend the authority of the executive agency involved (or its head) to conduct such procurement until the Board can decide the protest.

(2) The period referred to in paragraph (1) is the period beginning on the date on which the contract is awarded and ending at the end of the later of—

(A) the tenth day after the date of contract award; or

(B) the fifth day after the debriefing date offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required.

(3) The Board shall hold the requested hearing within 5 days after the date of the filing of the protest or, in the case of a request for debriefing, within 5 days after the later of the date of the filing of the protest or the date of the debriefing.

(4) The Board shall suspend the procurement authority of the executive agency involved (or its head) to acquire any goods or services under the contract which are not previously delivered and accepted unless such agency establishes that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Board.

(e) PROCEDURES.—

(1) PROCEEDINGS AND DISCOVERY.—The Board shall conduct proceedings and allow such discovery as may be required for the expeditious, fair, and rea-

sonable resolution of the protest. The Board shall limit discovery to material which is relevant to the grounds of protest or to such affirmative defenses as the executive agency involved, or any intervenor supporting the agency, may raise.

(2) PRIORITY.—Subject to any deadlines imposed pursuant to section 9(a) of the Contract Disputes Act of 1978 (41 U.S.C. 608(a)), the Board shall give priority over contract disputes and alternative dispute services to protests filed under this section. Except as provided in paragraph (3), the Board shall issue its final decision within 65 days after the date of the filing of the protest, unless the Chairman determines that the specific and unique circumstances of the protest require a longer period, in which case the Board shall issue such decision within the longer period determined by the Chairman. An amendment that adds a new ground of protest should be resolved, to the maximum extent practicable, within the time limits established for resolution of the initial protest.

(3) THRESHOLD.—Any protest in which the anticipated value of the contract award that will result from the protested procurement, as estimated by the executive agency involved, is less than $1,000,000 shall be considered under simplified rules of procedure. These rules shall provide that discovery in such protests shall be in writing only. Such protests shall be decided by a single Board judge, whose decision shall be final and conclusive and shall not be set aside except in cases of fraud. The Board shall issue its final decision in each such protest within 35 days after the date of the filing of the protest.

(4) CALCULATION OF TIME FOR ADR.—In calculating time for purposes of paragraph (2) or (3) of this subsection, any days during which proceedings are suspended for the purpose of attempting to resolve the protest by alternative means of dispute resolution, up to a maximum of 20 days, shall not be counted.

(5) DISMISSAL OF FRIVOLOUS PROTESTS.—The Board may dismiss a protest that the Board determines is frivolous or which, on its face, does not state a valid basis for protest.

(6) PAYMENT OF COSTS FOR FRIVOLOUS PROTESTS.—(A) If the Board expressly finds that a protest or a portion of a protest is frivolous or does not state on its face a valid basis for protest, the Board shall recommend that the protester or other interested party who joins the protest be liable to the United States for payment of the costs described in subparagraph (B) unless—

(i) special circumstances would make such payment unjust; or

(ii) the protester obtains documents or other information after the protest is filed with the Board that establishes that the protest or a portion of the protest is frivolous or does not state on its face a valid basis for protest, and the protester then promptly withdraws the protest or portion of the protest.

(B) The costs referred to in subparagraph (A) are all of the costs incurred by the United States of reviewing the protest, or of reviewing that portion of the protest for which the finding is made, including the fees and other expenses (as defined in section 2412(d)(2)(A) of title 28, United States Code) incurred by the United States in defending the protest.

(f) DECISIONS AND CORRECTIVE ACTIONS ON PROTESTS.—(1) In making a decision on protests filed under this section, the Board shall accord due weight to the goals of economic and efficient procurement, and shall take due account of the rule of prejudicial error.

(2) If the Board determines that a decision of a contracting officer violates a statute or regulation, the Board may order the agency (or its head) to take such corrective action as the Board considers appropriate. Corrective action includes recommending that the Federal agency—

(A) refrain from exercising any of its options under the contract;

(B) recompete the contract immediately;

(C) issue a new solicitation;

(D) terminate the contract;

(E) award a contract consistent with the requirements of such statute and regulation;

(F) implement any combination of recommendations under subparagraphs (A), (B), (C), (D), and (E); or

(G) implement such other recommendations as the Board determines to be necessary in order to promote compliance with procurement statutes and regulations.

(3) If the Board orders corrective action after the contract award, the affected contract shall be presumed valid as to all goods or services delivered and accepted under the contract before the corrective action was ordered.

(4) Any agreement that provides for the dismissal of a protest and involves a direct or indirect expenditure of appropriated funds shall be submitted to the Board and shall be made a part of the public record (subject to any protective order considered appropriate by the Board) before dismissal of the protest.

(g) AUTHORITY TO DECLARE ENTITLEMENT TO COSTS.—(1)(A) Whenever the Board determines that a decision of a contracting officer violates a statute or regulation, it may, in accordance with section 1304 of title 31, United States Code, further declare an appropriate prevailing party to be entitled to the costs of—

(i) filing and pursuing the protest, including reasonable attorneys' fees and consultant and expert witness fees, and

(ii) bid and proposal preparation.

(B) No party (other than a small business concern (within the meaning of section 3(a) of the Small Business Act)) may be declared entitled under this paragraph to costs for—

(i) consultants and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Federal Government, or

(ii) attorneys' fees that exceed $150 per hour unless the Board, on a case by case basis, determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

(2) Payment of amounts due from an agency under paragraph (1) or under the terms of a settlement agreement under subsection (e)(4) shall be made from the appropriation made by section 1304 of title 31, United States Code, for the payment of judgments. The executive agency concerned shall reimburse that appropriation account out of funds available for the procurement.

(h) APPEALS.—The final decision of the Board may be appealed as set forth in section 8(d)(1) of the Contract Disputes Act of 1978 by the head of the executive agency concerned and by any interested party, including interested parties who intervene in any protest filed under this section.

(i) ADDITIONAL RELIEF.—Nothing contained in this section shall affect the power of the Board to order any additional relief which it is authorized to provide under any statute or regulation.

(j) NONEXCLUSIVITY OF REMEDIES.—Nothing contained in this section shall affect the right of any interested party to file a protest with the contracting agency or to file an action in the United States Court of Federal Claims or in a United States district court.

SEC. 425. APPLICABILITY TO CONTRACTS FOR COMMERCIAL ITEMS.

Notwithstanding section 34 of the Office of Federal Procurement Policy Act (41 U.S.C. 430), the authority conferred on the Board by this title is applicable to contracts for the procurement of commercial items.

Subtitle D—Repeal of Other Statutes Authorizing Administrative Protests

SEC. 431. REPEALS.

(a) GSBCA PROVISIONS.—Subsection (f) of the Brooks Automatic Data Processing Act (section 111 of the Federal Property and Administrative Services Act of 1949; 40 U.S.C. 759) is repealed.

(b) GAO PROVISIONS.—Subchapter V of chapter 35 of title 31, United States Code (31 U.S.C. 3551–3556) is repealed.

Subtitle E—Transfers and Transitional, Savings, and Conforming Provisions

SEC. 441. TRANSFER AND ALLOCATION OF APPROPRIATIONS AND PERSONNEL.

(a) TRANSFER.—The personnel employed in connection with, and the assets, liabilities, contracts, property, records, and unexpended balance of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available to, or to be made available in connection with the functions vested by law in the Comptroller General pursuant to subchapter V of chapter 35 of title 31, United States Code, and in the boards of contract appeals established pursuant to section 8 of the Contract Disputes Act of 1978 (41 U.S.C. 607) (as in effect on the day before the effective date of this Act), shall be transferred to the Board for appropriate allocation by the Chairman.

(b) EFFECT ON PERSONNEL.—Personnel transferred pursuant to this title shall not be separated or reduced in classification or compensation for one year after such transfer, except for cause.

(c) REGULATIONS.—(1) The Board shall prescribe regulations for the release of competing employees in a reduction in force that gives due effect to—

(A) efficiency or performance ratings;

(B) military preference; and

(C) tenure of employment.

(2) In prescribing the regulations, the Board shall provide for military preference in the same manner as set forth in subchapter I of chapter 35 of title 5, United States Code.

SEC. 442. TERMINATIONS AND SAVINGS PROVISIONS.

(a) TERMINATION OF BOARDS OF CONTRACT APPEALS.—On the effective date of this title, the boards of contract appeals established pursuant to section 8 of the Contract Disputes Act of 1978 (41 U.S.C. 607) (as in effect on the day before the effective date of this Act) shall terminate.

(b) SAVINGS PROVISION FOR CONTRACT DISPUTE MATTERS PENDING BEFORE BOARDS.—The provisions of this title shall not affect any proceedings (other than bid protests pending before the board of contract appeals of the General Services Administration) pending on the effective date of this Act before any board of contract appeals described in subsection (a). Such proceedings shall be continued by the Board, and orders which were issued in any such proceeding by any board of contract appeals shall continue in effect until modified, terminated, superseded, or revoked by the Board, by a court of competent jurisdiction, or by operation of law.

(c) BID PROTEST TRANSITION PROVISIONS.—(1) No protest may be submitted to the Comptroller General pursuant to section 3553(a) of title 31, United States Code, or to the board of contract appeals for the General Services Administration pursuant to the Brooks Automatic Data Processing Act (40 U.S.C. 759) on or after the effective date of this Act.

(2) The provisions repealed by section 401 shall continue to apply to proceedings pending on the effective date of this title before the board of contract appeals of the General Services Administration and the Comptroller General pursuant to those provisions, until the board or the Comptroller General determines such proceedings have been completed.

SEC. 443. CONTRACT DISPUTE AUTHORITY OF BOARD.

(a) Section 2 of the Contract Disputes Act of 1978 (41 U.S.C. 601) is amended by striking out paragraph (6) and inserting in lieu thereof the following:

"(6) the term 'Board' means the United States Board of Contract Appeals; and".

(b) Section 6(c) of the Contract Disputes Act of 1978 (41 U.S.C. 605(c)) is amended—

(1) in paragraph (4)—

(A) by striking out "the agency board of contract appeals" and inserting in lieu thereof "the United States Board of Contract Appeals"; and

(B) by striking out "the board" and inserting in lieu thereof "the Board"; and

(2) in paragraph (6)—

(A) by striking out "an agency board of contract appeals" and inserting in lieu thereof "the United States Board of Contract Appeals"; and

(B) by striking out "agency board" and inserting in lieu thereof "the Board".

(c) Section 7 of the Contract Disputes Act of 1978 (41 U.S.C. 606) is amended by striking out "an agency board of contract appeals" and inserting in lieu thereof "the United States Board of Contract Appeals".

(d) Section 8 of the Contract Disputes Act of 1978 (41 U.S.C. 607) is amended—

(1) by amending the heading to read as follows:

"UNITED STATES BOARD OF CONTRACT APPEALS";

(2) by striking out subsections (a), (b), and (c);

(3) in subsection (d)—

(A) by striking out the first sentence and inserting in lieu thereof the following:

"The United States Board of Contract Appeals shall have jurisdiction to decide any appeal from a decision of a contracting officer of any executive agency relative to a contract made by that agency."; and

(B) in the second sentence, by striking out "the agency board" and inserting in lieu thereof "the Board";

(4) in subsection (e), by striking out "An agency board" and inserting in lieu thereof "The United States Board of Contract Appeals";

(5) in subsection (f), by striking out "each agency board" and inserting in lieu thereof "the United States Board of Contract Appeals";

(6) in subsection (g)—

(A) in the first sentence of paragraph (1), by striking out "an agency board of contract appeals" and inserting in lieu thereof "the United States Board of Contract Appeals";

(B) by striking out paragraph (2); and

(C) by redesignating paragraph (3) as paragraph (2);

(7) by striking out subsections (h) and (i); and

(8) by redesignating subsections (d), (e), (f), and (g) (as amended) as subsections (a), (b), (c), and (d), respectively.

(e) Section 9 of the Contract Disputes Act of 1978 (41 U.S.C. 608) is amended—

(1) in subsection (a), by striking out "each agency board" and inserting in lieu thereof "the United States Board of Contract Appeals"; and

(2) in subsection (b), by striking out "the agency board" and inserting in lieu thereof "the Board".

(f) Section 10 of the Contract Disputes Act of 1978 (41 U.S.C. 609) is amended—

(1) in subsection (a)—

(A) in the first sentence of paragraph (1)—

(i) by striking out "Except as provided in paragraph (2), and in" and inserting in lieu thereof "In"; and

(ii) by striking out "an agency board" and inserting in lieu thereof "the United States Board of Contract Appeals";

(B) by striking out paragraph (2); and

(C) by redesignating paragraph (3) as paragraph (2), and in that paragraph, by striking out "or (2)";

(2) in subsection (b), by striking out "any agency board" and "the agency board" and inserting in lieu of each "the Board";

(3) in subsection (c), by striking out "an agency board" and "the agency board" and inserting in lieu of each "the Board"; and

(4) in subsection (d), by striking out "one or more agency boards" and "or among the agency boards involved" and inserting in lieu of each "the Board".

(g) Section 11 of the Contract Disputes Act of 1978 (41 U.S.C. 610) is amended—

(1) in the first sentence, by striking out "an agency board of contract appeals" and inserting in lieu thereof "the United States Board of Contract Appeals"; and

(2) in the second sentence, by striking out "the agency board through the Attorney General; or upon application by the board of contract appeals of the Tennessee Valley Authority" and inserting in lieu thereof "the Board".

(h) Section 13 of the Contract Disputes Act of 1978 (41 U.S.C. 612) is amended—

(1) in subsection (b), by striking out "an agency board of contract appeals" and inserting in lieu thereof "the United States Board of Contract Appeals"; and

(2) in subsection (d)(2), by striking out "by the board of contract appeals for" and inserting in lieu thereof "by the Board from".

SEC. 444. REFERENCES TO AGENCY BOARDS OF CONTRACT APPEALS.

Any reference to an agency board of contract appeals in any provision of law or in any rule, regulation, or other paper of the United States shall be treated as referring to the United States Board of Contract Appeals.

SEC. 445. CONFORMING AMENDMENTS.

(a) TITLE 5.—Section 5372a of title 5, United States Code, is amended—

(1) in subsection (a)(1), by striking out "an agency board of contract appeals appointed under section 8 of the Contract Disputes Act of 1978" and inserting in lieu thereof "the United States Board of Contract Appeals";

(2) in subsection (a)(2), by striking out "an agency board of contract appeals established pursuant to section 8 of the Contract Disputes Act of 1978" and inserting in lieu thereof "the United States Board of Contract Appeals"; and

(3) in subsection (b), by striking out "an appeals board" each place it appears and inserting in lieu thereof "the appeals board".

(b) TITLE 10.—(1) Section 2305(e) of title 10, United States Code, is amended—

(A) in paragraph (1), by striking out "subchapter V of chapter 35 of title 31" and inserting in lieu thereof "title IV of the Federal Acquisition Reform Act of 1995"; and

(B) by striking out paragraph (3).

(2) Section 2305(f) of such title is amended—

(A) in paragraph (1), by striking out "in subparagraphs (A) through (F) of subsection (b)(1) of section 3554 of title 31" and inserting in lieu thereof "section 424(f)(2) of the Federal Acquisition Reform Act of 1995"; and

(B) in paragraph (2), by striking out "paragraph (1) of section 3554(c) of title 31" and inserting in lieu thereof "section 424(g)(1)(A) of the Federal Acquisition Reform Act of 1995".

(c) FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949.—(1) Section 303B(h) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253b(h)) is amended—

(A) in paragraph (1), by striking out "subchapter V of chapter 35 of title 31" and inserting in lieu thereof "title IV of the Federal Acquisition Reform Act of 1995"; and

(B) by striking out paragraph (3).

(2) Section 303B(i) of such Act (41 U.S.C. 253b(i)) is amended—

(A) in paragraph (1), by striking out "in subparagraphs (A) through (F) of subsection (b)(1) of section 3554 of title 31" and inserting in lieu thereof "section 424(f)(2) of the Federal Acquisition Reform Act of 1995"; and

(B) in paragraph (2), by striking out "paragraph (1) of section 3554(c) of title 31" and inserting in lieu thereof "section 424(g)(1)(A) of the Federal Acquisition Reform Act of 1995".

Subtitle F—Effective Date; Interim Appointment and Rules

SEC. 451. EFFECTIVE DATE.

This title shall take effect on October 1, 1996.

SEC. 452. INTERIM APPOINTMENT.

The Board judge serving as chairman of the board of contract appeals of the General Services Administration on the date of the enactment of this Act shall serve as Chairman during the two-year period beginning on the effective date of this title, unless such individual resigns such position or the position otherwise becomes vacant before the expiration of such period. The authority vested in the President by section 413 shall take effect upon the expiration of such two-year period or on the date such position is vacated, whichever occurs earlier.

SEC. 453. INTERIM RULES.

(a) RULES OF PROCEDURE.—Until such date as the Board promulgates rules of procedure, the rules of procedure of the board of contract appeals of the General Services Administration, as in effect on the effective date of this Act, shall be the rules of procedure of the Board.

(b) RULES REGARDING BOARD JUDGES.—Until such date as the Board promulgates rules governing the establishment and maintenance of a register of eligible applicants and the selection of Board judges, the rules of the Armed Services Board of Contract Appeals governing the establishment and maintenance of a register of eligible applicants and the selection of board members shall be the rules of the Board governing the establishment and maintenance of a register of eligible applicants and the selection of Board judges, except that any provisions of the rules of the Armed Services Board of Contract Appeals that authorize any individual other than the chairman of such board to select a Board judge shall have no effect.

TITLE V—EFFECTIVE DATES AND IMPLEMENTATION

SEC. 501. EFFECTIVE DATE AND APPLICABILITY.

(a) EFFECTIVE DATE.—Except as otherwise provided in this Act, this Act and the amendments made by this Act shall take effect on the date of the enactment of this Act.

(b) APPLICABILITY OF AMENDMENTS.—(1) An amendment made by this Act shall apply, in the manner prescribed in the final regulations promulgated pursuant to section 502 to implement such amendment, with respect to any solicitation that is issued, any unsolicited proposal that is received, and any contract entered into pursuant to such a solicitation or proposal, on or after the date described in paragraph (3).

(2) An amendment made by this Act shall also apply, to the extent and in the manner prescribed in the final regulations promulgated pursuant to section 502 to implement such amendment, with respect to any matter related to—

(A) a contract that is in effect on the date described in paragraph (3);

(B) an offer under consideration on the date described in paragraph (3); or

(C) any other proceeding or action that is ongoing on the date described in paragraph (3).

(3) The date referred to in paragraphs (1) and (2) is the date specified in such final regulations. The date so specified shall be October 1, 1996, or any earlier date that is not within 30 days after the date on which such final regulations are published.

SEC. 502. IMPLEMENTING REGULATIONS.

(a) PROPOSED REVISIONS.—Proposed revisions to the Federal Acquisition Regulation and such other proposed regulations (or revisions to existing regulations) as may be necessary to implement this Act shall be published in the Federal Register not later than 210 days after the date of the enactment of this Act.

(b) PUBLIC COMMENT.—The proposed regulations described in subsection (a) shall be made available for public comment for a period of not less than 60 days.

(c) FINAL REGULATIONS.—Final regulations shall be published in the Federal Register not later than 330 days after the date of enactment of this Act.

(d) MODIFICATIONS.—Final regulations promulgated pursuant to this section to implement an amendment made by this Act may provide for modification of an existing contract without consideration upon the request of the contractor.

(e) SAVINGS PROVISIONS.—(1) Nothing in this Act shall be construed to affect the validity of any action taken or any contract entered into before the date specified in the regulations pursuant to section 501(b)(3) except to the extent and in the manner prescribed in such regulations.

(2) Except as specifically provided in this Act, nothing in this Act shall be construed to require the renegotiation or modification of contracts in existence on the date of the enactment of this Act.

(3) Except as otherwise provided in this Act, a law amended by this Act shall continue to be applied according to the provisions thereof as such law was in effect on the day before the date of the enactment of this Act until—

(A) the date specified in final regulations implementing the amendment of that law (as promulgated pursuant to this section); or

(B) if no such date is specified in regulations, October 1, 1996.

Mr. CLINGER. At this time, I would like to call on Mr. Spence, the chairman of the National Security Committee, who has been so very, very important in fashioning the legislation that we are dealing with. Chairman Spence.

Mr. SPENCE. Thank you, Chairman Clinger. I join you in welcoming the witnesses to this unprecedented hearing this morning. This marks the first joint meeting of the Committee on Government Reform and Oversight and the Committee on National Security.

I want to apologize in advance for what I expect may be spotty attendance by some of the Members of my committee, but we completed last night about 11:45 a 14-hour markup—I might add with a vote of 48 to 3—and we are still reeling from that session.

By way of introduction, this morning's hearing represents a refreshing break in tradition. The chairman has indicated that. The reputation in the past between our committees on issues of acquisition policy has been one of contention in some cases and conflict and gridlock in the past. This tradition of confrontation has now yielded to a tradition of cooperation.

H.R. 1670, the bill before the committee this morning, represents the fruits of this new relationship. We are focused on the defense acquisition system for the governmentwide system.

I think it is fair to say that a strong consensus exists on both committees that the Federal acquisition process needs fundamental reform, not just tinkering at the margins. The American taxpayers are paying too much for goods that take too long to deliver and usually are one or two generations behind technology edge.

Last year, we did incremental reform. This year, we must do fundamental reform in order to allow the DOD and other Federal agencies to continue to perform their mission with reduced budgets ahead.

I look forward to this morning's meeting and discussions and to continuing our work with Chairman Clinger and other Members of both committees in fundamentally reshaping the Federal acquisition system. Thank you, Mr. Chairman.

Mr. CLINGER. Thank you, Chairman Spence.

I am pleased to recognize the fine Ranking Member of the full committee, the gentlelady from Illinois, Mrs. Collins.

Mrs. COLLINS. Thank you, Mr. Chairman.

As you know, less than 9 months ago we passed the most comprehensive governmentwide acquisition reform act in over a decade, the Federal Acquisition Streamlining Act of 1994, known as FASA. We accomplished this by increasing the Government's use of commercial practices, by streamlining agency rules and regulations and by improving the access of small businesses to Government contracting opportunities.

While more work remains on improving the Federal Government's procurement system, we should move carefully in making additional reforms so soon after FASA. I am concerned that this procurement train may be moving much too quickly. This hearing is being held only 1 week after the introduction of H.R. 1670. Many in the procurement community have not had an adequate opportunity to study the important policy and technical issues raised by this legislation. What is the rush?

We should not repeat the mistakes we made during the first 100 days of this Congress, when legislation was rushed through our committee without adequate deliberation. That racehorse legislative process resulted in numerous mistakes and prolonged House-Senate conference meetings to correct needless errors.

In that regard, Mr. Chairman, I request that the committee hold at least one additional hearing on this bill prior to any markup. An additional day of hearings would give all Members a better opportunity to fully understand the implications of this bill and give other interested parties an opportunity to testify.

Mr. Chairman, I have approached this bill with an open mind. However, several provisions of H.R. 1670 stand out as potential areas of concern. The cornerstone of our free enterprise system is full and open competition. The competitive market ensures fair prices, creates incentives for vendors to develop new and innovative products, and will continue to fuel the high-technology engine of our economy. These market forces are essential if we are to position our country for economic leadership into the next century.

H.R. 1670 detours from the road of full and open competition and into the uncharted wilderness of maximum practicable competition. While it is unclear from the bill what is meant by this new standard, I am concerned that it may have the effect of deterring new and small businesses from participating fully in the Federal marketplace.

Over the next 10 years, 85 percent of all new jobs in this country will come from small businesses. If we establish procurement policies which lock out our small businesses in favor of speedy procurement, we will significantly undermine our Nation's competitiveness.

Accompanying this shift away from full and open competition is the bill's requirement for a contractor verification system. As I un-

derstand this provision, each agency would use this new system to award verifications for the purpose of deciding which firms would be able to bid on agency solicitations. The creation of a new verification process would appear to go against the whole notion of streamlining and simplifying our procurement system. We must also be careful to avoid the creation of an "old-boy" network, where well-connected firms with large public relations departments dominate our procurement process.

H.R. 1670 makes several important changes to statutes designed to protect the Federal Government from procurement fraud and abuse. The bill eliminates several agency-specific, post-employment restrictions. Before we make these changes we should be absolutely sure that the elimination of these protections will not in any way hinder the ability of the Department of Justice and DOD Inspector General from bringing criminal and civil procurement fraud cases.

I have asked the Attorney General for her views on how these proposed changes would affect the ability of the Department of Justice to prosecute procurement fraud. I know many of our current Members were not here during the Defense procurement scandals of the 1980's involving Operation Ill-Wind and Wedtech. Well, I was here. I can tell you that many of the laws that would be eliminated by this bill were enacted to deter these types of procurement frauds. Yes, we should definitely be cautious about removing deterrents to crime.

Another provision of H.R. 1670 would streamline the bid protest system. The bill consolidates the administrative dispute resolution forums, the 11 boards of contract appeals, the GAO bid protest section and the General Services Board of Contract Appeals into a new U.S. Board of Contract Appeals. Under this bill, if the board determines that a contracting officer's decision violates a Federal law, the board is authorized to recommend certain actions to the appropriate agency.

I am concerned that the bill is unclear about the board's authority to direct corrective action. This new board can only be effective if it has the authority to require Federal agencies to take corrective measures.

We should also look very carefully at the bill's elimination of the simplified acquisition threshold for commercial products. As you are aware, in the recently passed Federal Acquisition Streamlining Act, we just raised the simplified acquisition threshold from $25,000 to $100,000. On a governmentwide basis, this action will allow use of simplified procedures for an additional 45,000 procurements that have an aggregate value of approximately $3 billion per year.

If we eliminate the simplified threshold for commercial products, we are permitting limited or no competition for commercial items worth billions of dollars. For example, this provision might permit an agency to sole source a new telephone system without any competition. How can we ensure that we maintain the appropriate level of competition for large-scale commercial items? These are some of the questions that should be answered before we move forward with this reform.

Mr. Chairman, our procurement laws should be designed to ensure that all businesses, large and small, new and old, have a fair

opportunity to compete in the Federal marketplace. We must be careful not to inadvertently create an unequal playing field in which small and new businesses are locked out.

Finally, Mr. Chairman, our committee has a long history of bipartisanship on procurement reform. I look forward to working with you and other Members to develop consensus procurement reform bill.

Mr. Chairman, I yield back the balance of my time.

Mr. CLINGER. I thank the gentlelady for her comments.

I would note that many of the provisions that are included in the legislation that we have before us came about as a result of suggestions and recommendations that we received in the previous hearing on this matter which was held in February of this year. So these are not brand new. These are suggestions and recommendations that came about as a result of witnesses we had before us earlier this year.

I now recognize the chairman of the subcommittee of jurisdiction, the very fine gentleman from California, Mr. Horn.

Mr. HORN. Thank you, Mr. Chairman.

I want to commend you and Chairman Spence and our joint procurement counsel, Ellen Brown, representing both the full committee and the subcommittee, for the fine job you have done in going over the ideas that were voiced on February 28, 1995, when the Subcommittee on Government Management, Information and Technology met to solicit ideas from many of the parties. We commend the bill that both you and the then majority were able to get through Congress in the fall of 1994.

I think there are a number of good ideas. We are going to hear from the witnesses, so I would like to put my full statement in the record without having to read it and get on with business.

Mr. CLINGER. I thank the gentleman very much.

[The prepared statement of Hon. Stephen Horn follows:]

PREPARED STATEMENT OF HON. STEPHEN HORN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

On February 28, 1995, the Subcommittee on Government Management, Information, and Technology met to solicit from interested parties proposals for simplifying and streamlining the Federal procurement process. This effort was a follow-up to the Federal Acquisition Streamlining Act of 1994 (FASA) which was enacted last year on a bipartisan to reform the complex Federal procurement system.

During that hearing we were exposed to various proposals for reform—ranging from minor technical corrections to a complete overhaul of the system. During the last few months, Chairman Clinger and Chairman Spence, in conjunction with other committee members, have poured over this wealth of ideas. This effort culminated in the introduction of H.R. 1670, the "Federal Acquisition Reform Act of 1995."

Currently, the acquisition system is a mass of requirements that lead, simply, to too much money being spent for too little product. It is particularly important in these times of declining budgets to continue the process of bringing the system into balance.

Congress passed legislation last year which made incremental changes to an arcane system. Today, however, I think we all share enthusiasm for H.R. 1670, which will result in fundamental change and bring us one step closer to a Federal procurement system which would permit our acquisition professionals to act more like commercial buyers in the private sector.

I look forward to hearing from the many qualified witnesses and working with my colleagues here today to move this legislative proposal toward passage.

Mr. CLINGER. In the interest of time, I am hopeful that Members might be willing to submit their opening statements, if they have

any, for the record. But if there are some who have brief statements they would like to make——

Mrs. COLLINS. Mr. Chairman, the ranking member of the subcommittee has asked that her remarks be submitted at this point in the record.

Mr. CLINGER. Without objection, so ordered.

[The prepared statement of Hon. Carolyn B. Maloney follows:]

PREPARED STATEMENT OF HON. CAROLYN B. MALONEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Thank you Mr. Chairman. I would like first of all to commend Chairman Clinger and Chairman Spence for their hard work and diligence in crafting H.R. 1670, the Federal Acquisition Reform Act of 1995. Your sincere commitment to the reform of the Federal procurement system is deeply appreciated by myself and, I am sure, by many other Members of Congress and the Administration.

In fact, if anything I would say that you are perhaps overly zealous. The bill before us was introduced just one week ago and I have had little time to study it. I hope that this hearing helps all of us to understand the implications of this legislation fully, but it may be that another hearing on this bill is necessary, since many of the witnesses requested by the Minority side were unable to appear on such short notice.

I have long had an interest in Federal procurement issues. In my view, the way in which the Federal government spends over $200 billion every year is an issue of vital concern. If we want to control spending and better manage our limited resources there are few areas of the Federal government that are more important. I was the co-chair of the Freshman Task Force on Procurement Reform in the 103rd Congress and am proud to have played a small part in the enactment of FASA, the Federal Acquisition and Streamlining Act of 1994.

In general, I believe that the bill we are considering today represents a genuine attempt to lessen the burdens on, and the costs to, the Federal government in its acquisition of goods and services. Cleaning up the procurement code and ridding it of duplicative and outdated requirements is a goal few would argue with. Indeed, that is a major part of Vice President Gore's efforts to re-invent government, and I welcome this bill in that spirit.

However, I have some serious concerns with some of the provisions of this legislation which will hopefully be addressed here today. First and foremost, this bill would replace the "full and open competition" standard which has been law for over a decade with a "maximum practicable" standard. This would allow contracting officers to limit the competitive range for each procurement. Anyone who is familiar with procurement issues knows that deciding who can compete on a given contract is a very powerful position indeed, and one which has sometimes been abused in the past. Many argue that this step is necessary if we are to achieve real cost-savings, but I for one will have to be convinced that those savings outweigh the rights of individuals to do business with the government. It is particularly important that the system remain fair and open to new companies.

Another provision of this bill would consolidate the two current bid protest forums into one, the US Board of Contract Appeals, by merging not only the personnel but the policies of those two existing forums. While I am open to this streamlining of the bid protest system, significant questions need to be answered about the structure, operations and procedures of this new forum.

I am also seriously concerned about the language in this legislation which repeals the government's ability to recoup the cost of research and development on arms sales. The American taxpayer underwrites the costs of this research. In these times of fiscal restraint this provision would cost a significant amount. Since 1992, these fees have been charged only on government to government sales, not commercial ones. Some would argue that we must level this playing field; I believe the proper way to do that is to reinstate recoupment fees on commercial sales, thus saving the taxpayer even more. To those who believe that we must repeal this law in order to make American arms more competitive, I would point out that the United States already has over 70% of the world's weapons market. I also fail to see how this can be construed as a procurement issue.

Finally, there is one area where this legislation does not go far enough. A major thrust of FASA, and of this bill, is placing more responsibility and decision-making power on the front-lines of procurement, with the contracting officer. We are also currently witnessing a significant down-sizing of the procurement workforce. These

streamlining initiatives will be successful only if we have a highly trained and motivated cadre of professionals. At a previous hearing on procurement policy this Committee heard testimony that "Congress should take the necessary action to assure that civilian agencies are given the resources and tools to promote professionalism in their procurement workforce." The Defense Acquisition Workforce Improvement Act has already begun providing these resources to the Department of Defense. I plan to introduce legislation soon to expand this ability to the civilian agencies. I would welcome support from the other side of the aisle in what should truly be a bipartisan effort.

Thank you Mr. Chairman.

Mr. CLINGER. If there are those who feel the need to speak at this time, I will recognize somebody. If not, I would urge them to submit their comments for the record.

[The prepared statements of Hon. Gil Gutknecht, Hon. William H. Zeliff, Jr., Hon. Charles F. Bass, and Hon. Frank Mascara follow:]

PREPARED STATEMENT OF HON. GIL GUTKNECHT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MINNESOTA

Thank you Mr. Chairman for the opportunity to make a few brief remarks on this important legislation.

For years, the federal government has had a set procedure for purchasing from the private sector. The purpose for this policy was to insure that the federal government was buying materials at the best possible price, thus saving U.S. tax dollars. Initially, this new policy worked and the federal government was saving money. Over the years, however, what resulted was additional layers of bureaucracy and a 19 percent increase in the purchasing cost per item.

For over a decade, I was a small businessman in southeast Minnesota. Everyday, I had to make sure that I kept my expenses down while maximizing my sales. If I, or anyone in the small business community, established a bureaucratic policy that took extra time and cost more money, we would go bankrupt!

Mr. Chairman, this government policy just doesn't make sense and must be changed. I fully support H.R. 1670 and strongly encourage my fellow colleagues do vote for its passage.

PREPARED STATEMENT OF HON. WILLIAM H. ZELIFF, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW HAMPSHIRE

Thank you, Chairman Clinger, Chairman Spence, and fellow members. I am pleased and excited to participate in today's hearing, as both a member of the Government Reform and Oversight Committee and as a co-sponsor of H.R. 1670, "The Federal Acquisition and Reform Act (FARA) of 1995." Chairman Clinger and Chairman Spence both deserve great credit for forging this partnership to address our bloated, inefficient, and costly federal acquisition system.

As most know, the inefficiencies and costs of the federal procurement system affect one federal agency more than any other—the Department of Defense (DoD). Nearly 80% of the approximately $200 billion that our government annually spends on goods and services is spent by DoD. That's nearly $160 billion a year. In separate reports, DoD and the General Accounting Office (GAO) agree that DoD pays an additional 18% to 19% in costs generated by the existing red-tape in government contracting. That's an added $28 to $30 billion dollars in cost per year, and I think that leaves a lot of room for improvement.

I want to congratulate, today especially, Chairman Clinger. Last year, Chairman Clinger helped improve the procurement process by leading the fight to pass the Federal Acquisition Streamlining Act (FASA) of 1994. Among other reforms, FASA streamlined federal procurement and established a preference for commercial items that simplified contracting procedures for contracts under $100,000. But FASA was only a first step. With H.R. 1670, we will again give the taxpayer more "bang for the buck."

One last thought: I am Chairman of the Subcommittee on National Security of the House Government Reform and Oversight Committee; but I am also a small businessman. I believe we need to learn from the private sector and reform the way our government does business. The culture surrounding the federal procurement process, especially within DoD, must be re-assessed and fundamentally changed. We

simply can not afford to nibble at the edges of a system that cries out for major reform.

As the Chairman of a subcommittee charged with the duty to oversee the "economy and efficiency" of DoD, I am pleased to join together today with Chairmen Spence and Clinger as a co-sponsor of the Federal Acquisition Reform Act of 1995. FARA calls for fundamental change that is long overdue. Many among us, Republicans and Democrats, have been working to develop new and creative ways to improve the way the government does business. We have a wealth of ideas and energy in this Congress. We should take advantage of this opportunity and channel that creative energy into a positive force that produces major procurement reform. That's what the American people expect of us—and that's what we hope to deliver with the passage of the Clinger-Spence procurement reform bill.

I certainly pledge my cooperation, energies, and the resources of my subcommittee to ensure that H.R. 1670 reflects the ideas and solutions that bring about fundamental change in federal acquisition regulation.

I look forward to hearing and learning from the many distinguished witnesses scheduled for today's hearing. Thank you Mr. Chairman.

PREPARED STATEMENT OF HON. CHARLES F. BASS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW HAMPSHIRE

I'd like to thank Chairman Clinger and Chairman Spence for holding this joint hearing this morning on procurement reform, especially on the day after the National Security Committee marked up the Defense Reauthorization bill. This is an important topic, and it is important that the Government Reform Committee and the National Security Committee work together as we continue to make much-needed reforms in the way the government purchases goods and services.

I will be listening to today's testimony with great interest, as I am a cosponsor not only of H.R. 1670, the Clinger-Spence bill, but also of H.R. 1368, the Kasich bill that specifically focuses on defense acquisition reform. I cosponsored Clinger-Spence with the understanding that it does not conflict with, but rather complements, H.R. 1368. It is my hope that the testimony that we will hear today will help to establish if these two bills can strengthen each other, and whether it might be advantageous to combine them.

It is my belief that Clinger-Spence and Kasich could indeed be merged to the benefit of both. Specifically, I would like to work with Chairmen Clinger, Spence, and Kasich to include Titles I and II of the Kasich bill with H.R. 1670 as we move through markup.

I thank the Chairman.

PREPARED STATEMENT OF HON. FRANK MASCARA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Good morning Mr. Chairman. I deeply appreciate your calling this hearing to examine legislation recently introduced by Chairman Clinger and Chairman Spence to further revise Federal procurement laws.

As I indicated during our previous hearings on this subject, I concur with the need to reform the procurement process. Seven hundred dollar hammers and coffee pots still loom large in the public's memory and this type of unnecessary and excessive spending must stop.

Less than a year ago, before I was elected, Congress enacted and the President signed into law the Federal Acquisition Streamlining Act of 1994.

This was an unprecedented, bipartisan effort, to get rid of the waste and the mound of regulations that have tied the procurement process in knots.

Since the session began in January, the Government Reform and Oversight Committee has held at least two hearings to examine the early implementation of this law.

Obviously both the administration and Chairman Clinger feel further steps must be taken and both have introduced additional reform legislation which we are considering here today.

I certainly will defer to those more expert in the procurement field than myself to judge if further action is really necessary. However, common sense requires me to ask do we really have enough experience with this new law, only eight months old, to be plowing ahead already with further changes?

Should we be giving our agencies and departments a little more time to work with this streamlining act before we start changing it again?

Moreover, after reviewing the materials provided by the committee staff, I must say I am troubled that some portions of Chairmen Clinger's and Spence's legislation could lead to a bias against small businesses.

Further, it might well block those firms which have a sound compliant against the contracting process from getting a fair hearing.

I do not think is the outcome we want.

Thus, I would recommend we proceed slowly here and get as much testimony as possible from those who work in this field on a day-to-day basis before we report something that is going to cause more harm than good.

I truly look forward to hearing today's witnesses.

Thank you Mr. Chairman.

Mr. CLINGER. If not, I want to remind all of our witnesses that your entire statements will be entered into the record; but we ask you, in view of the fact that we have a number of witnesses today, that if you would limit your oral statements to 5 minutes. And I would also remind our panelists, the members of the panel here, that we will limit the questioning to 5 minutes. We only impose this limit because there are so many witnesses we want to hear.

For our first panel, I am going to ask our friend from Virginia to introduce them. But, before I do so, it is the practice of the Committee on Government Reform and Oversight to swear witnesses. And to avoid appearance of favoritism there have been no exceptions to this policy. We have asked every panel to be sworn in before they testify.

[Witnesses sworn.]

Mr. CLINGER. The gentleman from Virginia, Mr. Davis.

Mr. DAVIS. Thank you, Mr. Chairman.

I want to welcome our distinguished group of witnesses as we gather in this joint hearing to discuss the need for substantial reform of the Federal procurement system. I have had the privilege of working with several of these witnesses in the private sector.

PRC—Jim Leto is the chairman and chief executive officer, he is here today representing not only PRC but also appearing on behalf of the Acquisition Reform Working Group, which represents nine industry associations.

Mr. Stanley Ebner is senior vice president of Washington operations, for McDonnell Douglas Corporation. He also represents and is an active participant in the Acquisition Reform Working Group.

We have Milton Cooper, the president of systems group of Computer Science Corporation and is representing the Information Technology Association of America.

And Mr. Edward Cypert is the vice president of operations, space and electronic group of TRW. He is also here as an active member of the Acquisition Reform Working Group.

Mr. CLINGER. Thank you very much.

STATEMENT OF JAMES LETO, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, PRC, INC., FOR THE ACQUISITION REFORM WORKING GROUP (ARWG)

Mr. CLINGER. With that, I would recognize Mr. Leto for your statement.

Mr. LETO. Thank you, Congressman Davis, for that introduction. You have done well.

Chairman Clinger, Chairman Spence, and Members of the committees, I am very pleased and proud and almost honored to be here—and a bit nervous. Suffice it to say that I also agree with

Chairman Spence that this is unprecedented. I have been in Washington for a long time, and I have never seen these two committees come to agreement on procurement reform as they have. And I think it bodes very well for the 104th Congress. I think we are going to achieve a great deal this year.

I also come before you wearing two hats. The first hat that I wear is as chairman and CEO of a $900 million corporation who employs some 7,000 people all over the United States, and 90 percent of what we do is Federal procurement related. The second hat that I wear is on behalf of the Acquisition Reform Working Group, otherwise known as ARWG. It is a lot easier to say.

ARWG has come together as a result of nine associations who are actively engaged in making sure that the procurement reform bill goes forward in full representation of their constituency, which consists of literally thousands of companies all over the United States, both large and small, hardware, software, weapons manufacturers, et cetera.

I would argue that my position as CEO is aggressive and aggressively in support of this bill. Suffice it to say, as the first speaker, I get to set the tone for this meeting; and on behalf of the industry, myself and ARWG, we are extremely excited about the opportunities for this bill to become law.

Let me speak briefly about four areas of the bill that we are actively engaged with. Let me say at the outset than because ARWG represents almost 10,000 companies across the country, their views are significantly more conservative and cautious than are mine as a large corporate CEO. And where my view differs from their view I will so note it in the testimony.

I would like to speak about four areas: competition, the commercial items in the bill, bid protest and contract disputes, and reliance on the private sector.

First, let me talk about competition. On behalf of ARWG and on behalf of my company, we strongly endorse the Government's prerogative to limit the numbers of bidders on any procurement to those bidders that they perceive to be qualified. We strongly endorse that.

To caveat that, I would add on behalf of ARWG that there needs to be some language in the bill that protects small businesses. There are many small businesses in this country that are certainly qualified, as is PRC, to bid on certain kinds of procurements where their technology and their unique capabilities are perfectly in sync with those procurements; and we need to find some language in the bill that makes sure that the rules are such that small businesses can play in large procurements.

Second, let me talk about commercial items. I think everybody knows, particularly those involved in the Pentagon and doing work for DOD, that mil spec standards have become a dinosaur and that there is a rapid move toward commercial, off-the-shelf kinds of items and procurements. We routinely bid procurements today where commercial, off-the-shelf products are specified as part of the requirements of those bid.

I am very encouraged by the fact that this bill endorses a trend that has already begun to take place in the Government, and I think this trend going forward will save both industry and the Gov-

ernment an enormous amount of money in terms of reducing the cost-accounting applications that apply to many of the procurements that we participate in.

Let me talk briefly about bid protest and contract disputes. I would argue that this part of the procurement bill will probably be the most controversial.

As a large corporation, 90 percent of which what we do is information technology based. We are very familiar with GSBCA rules, and we participate in GSBCA protests whenever we think it is appropriate and where there has been what we believe to be an egregious action.

I would also argue that, on behalf of my company, that is infrequent. We do not frequently file GSBCA protests, for a lot of good reasons. Let me give you an example.

We recently lost a billion dollar procurement, and it is not nice to lose. When we evaluated all the data, we determined that there may be some grounds for protest. We also determined that if we were to protest there is a high likelihood that we wouldn't win. Anything that is 50/50 I consider to be a high likelihood that we won't win.

The cost of filing a GSBCA protest for my company is about $10,000 a day. That $10,000 a day, by definition, precludes a lot of small companies from participating in those kinds of bid protest activities.

Having said that, let me say that the proposal to establish a centralized authority for contract appeals is very appealing to my company, and it is very appealing to ARWG. I think the addition of the alternative dispute resolution process as the front end of that process makes the protest bid process available to both large and small companies.

We have had personal experience, and I think PRC is probably one of the first companies a year ago to undergo an alternative dispute resolution process in solving a claims dispute with the Government. I've got to tell you that on behalf of the Government and on behalf of PRC we are both pleased with the outcome. In any kind of claims dispute that is a very positive outcome.

So we strongly endorse a centralized contract appeals board. We particularly endorse it since it provides for an alternative dispute resolution process as the front end of that vehicle, making the vehicle available to small and large businesses.

Last, let me talk about the language in the bill that talks about reliance on the private sector. It would be foolhardy for a representative of the private sector to argue against motherhood and sunshine, and for us this is a bit of motherhood and sunshine.

We are encouraged by the fact that there will be statutory language in the bill which encourages the Government to rely upon the private sector to provide goods and services to the Government as an alternative for the Government to build that capability and capacity internally.

We also believe that this notion of relying on the private sector is completely consistent with the notion of reinventing Government and, more importantly, I think is consistent with the recommendations that were made in the National Performance Review a year ago.

So, consequently, on behalf of ARWG and on behalf of my company, we strongly endorse the language with regard to reliance on the private sector.

In closing, let me very quickly make a pledge to both committees. On behalf of my company and on behalf of ARWG, we obviously strongly endorse the bill, but I will make a commitment to you that we will do everything in our power to support both committees during the deliberations that are bound to ensue and be controversial in the next several months, do everything within our power and within the organizations that we represent to assist you in making this bill law. Thank you.

Mr. CLINGER. Thank you very much Mr. Leto for a very helpful testimony.

[The prepared statement of Mr. Leto follows:]

PREPARED STATEMENT OF JAMES LETO, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, PRC, INC., FOR THE ACQUISITION REFORM WORKING GROUP (ARWG)

Chairman Clinger, Chairman Spence, members of the Committees, it is indeed a pleasure and privilege to appear before you today at this hearing. On behalf of the Acquisition Reform Working Group, which is comprised of nine associations representing tens of thousands of large and small companies, created to respond to the movement of Congress toward acquisition reform, I am truly glad to have the opportunity to present industry's comments at this hearing today on the Federal Acquisition Reform Act (FARA). I am Jim Leto, Chairman & CEO of PRC Inc., a professional services company specializing in information technology for federal government, international and commercial customers.

Let me begin by recognizing the dynamic work of your Committees and the extraordinary leadership you have shown in reforming federal acquisition. Last year's massive legislative effort represented a solid start toward fundamentally transforming federal acquisition. This year, we commend you for producing thoughtful and sound proposals that will address the system's underlying regulatory burdens and excessive costs. We recognize and applaud your Committees' sincere commitment to improve the way the government buys its goods and services.

Turning to the substance of H.R. 1670, I can tell you with confidence that the organizations I represent are strongly supportive of many provisions in this legislation. Other areas have promise, but may need to be further refined, to truly understand the direction you are going, before constructive input can be given. I know from your previous comments that the door remains open for discussion of any differences we may have or suggested improvements.

In total, this legislation constitutes more than statutory preferences for commercial products. It offers more than bid protest reform. This legislation seeks to change, through substantive reform, the presumptions of the current procurement process. It has the potential to shift presumptions of private- and public-sector business interactions from negative ones to positive ones. It has the potential to foster cooperation and non-adversarial practices between government and industry procurement professionals. And, it carries with it the potential to do these things cheaper, faster, and better than they are currently done today. And that is important to all of us. Allow me to focus now on the key elements of the bill with specific comments.

COMPETITION

Improvement of Competition Requirements

The legislation appears to give government procurement officials the right to limit the number of offerors prior to the onset of the source selection process. ARWG recognizes and appreciates the need to ensure that the costs of conducting unlimited competition do not overtake the potential savings that can be achieved through the use of commercial sources for goods and services. We also recognize that Title I of the bill would move the government increasingly in the direction of the adoption of more commercial practices, something we have long and heartily endorsed.

While ARWG endorses the conceptual basis of the proposed competition requirements, we believe that clear guidance outlining the full scope of congressional intent is needed. More specific criteria must be included to ensure that a transparent and equitable competitive process ensues, particularly with regard to small businesses

and new entries, as well as to provide appropriate protections for companies excluded from a particular procurement.

Finally, it is our strong belief that the impacts of this section are so far-reaching and diverse that a negotiated rulemaking process represents the best means for developing an effective, fair and comprehensive rule. We would, therefore, urge that you include in the legislation a requirement that a negotiated rulemaking process be implemented for the development of the regulations pertaining to Title I of the bill.

COMMERCIAL ITEMS

ARWG is very pleased with the changes made through the bill's commercial items provisions. This bill positively addresses critical issues in the area of cost and pricing data, post-award audits, and cost accounting standards. We fully expect that the proposed changes will enhance the government's ability to buy off-the-shelf goods and services and encourage commercial companies to enter the federal marketplace.

We applaud the elimination of post award audits for commercial product procurements. These type of audits are after-the-fact second guessing and are wholly foreign in the commercial marketplace. We have long held that adequate information is available in the commercial marketplace to enable a contracting officer to determine prior to contract award the reasonableness of the contract price. In a directly related provision, we strongly support the clear exemption to the Truth in Negotiations Act that is provided in H.R. 1670.

Attempting to specifically waive individual elements of existing legislation to remove all barriers to the integration of the commercial and defense sectors is a hit-or-miss process. Therefore, ARWG recommends a more global approach to add new sections to Title 10 and Title 41 of the U.S. Code that deal exclusively with the acquisition of commercial products and services. Such provisions would expressly supersede any other provisions of law and would require the acquisition of commercial items in accordance with commercial terms, conditions, practices, and specification at the manufacturers' commercial prices. Commercial companies would still be required to comply with all of the laws that apply to U.S. businesses, such as equal employment opportunity, minimum wage requirements, and Securities and Exchange Commission regulations.

If waivers cannot be addressed on the global basis described above, then we continue to believe that in order to take full advantage of products in the commercial marketplace, additional prime contract barriers must be lifted. Some of the additional statutes we believe should be waived for prime commercial contracts include rights in technical data, cargo preferences, and Buy American Trade Agreements provisions. A full list of statutes is included in the ARWG legislative recommendations package of May 10, 1995, as previously provided to your Committees.

BID PROTESTS AND CONTRACT DISPUTES

ARWG is encouraged that your Committees have chosen to give the bid protest issue serious attention as part of your acquisition reform package. We share the Committees' goal to improve significantly the acquisition process. We perceive bid protests as only one part of the broader procurement process, and with the improvement of the acquisition system will come a reduced use of the protest system. The protest process now in place can be made more efficient; and we believe improvements will be obtained with the implementation of Federal Acquisition Streamlining Act of 1994 (FASA).

With regard to your streamlining proposal, we agree that improvements can be made in the protest fora. ARWG strongly endorses the use of alternative dispute resolution mechanisms and the establishment of sanctions for frivolous protests. In reference to combining the existing fora into a single forum, we acknowledge that greater consistency, efficiency, and equity may result. While we would like to put forth more constructive comments on the proposed language, we believe the issue is so complex that it would benefit from further discussion and refinement of the key elements. ARWG looks forward to engaging in a collective effort over the next few weeks to discuss the full range of these issues.

ADDITIONAL REFORM PROVISIONS

Government Reliance on the Private Sector

ARWG applauds the Committees for their strong statement in support of reliance on the private sector for goods and services needed in the government. For the first time in our history, your Committees will place in statute policy to rely on the nation's private sector. As you know, this statutory policy void has caused displace-

ment in the private sector as the government has continued to perform more and more functions currently available through existing private-sector vendors. There can be no question that the development of capabilities in the private sector, rather than the public sector is in the nation's best interest. As the resources of the government decrease, this is a fitting time to assure the government is operating in its proper role and utilizing existing private-sector resources for non-governmental functions. ARWG has provided the Committees with a representative list of appropriate private-sector functions and request that you include the list in the Hearing Report.

At the same time we applaud the statutory statement, we must also remind the committee of the critically important tasks still before us. We need to grapple with the linchpin issues of public-private competitions, and the validity and fairness of the current cost-comparison process. By any measure, the current process fails to adequately account for government costs, and skews the selection away from the private sector.

ARWG strongly supports the provision in this bill, and further, hopes to work with this Committee to develop follow-on legislation to establish necessary enforcement mechanisms to ensure that this reliance on the private sector is fully embraced in the agencies.

Elimination of Certain Certification Requirements

ARWG whole-heartedly endorses this provision as a benchmark for elimination of non-value added administrative burdens. Not only does this section adopt the essence of the ARWG recommendation to statutorily prohibit the regulatory implementation of unnecessarily burdensome non-statutory certifications, it goes further. While maintaining the integrity of compliance requirements, Section 302 repeals four statutory certifications pertaining to requests for equitable adjustments and other relief, contractor inventory control systems, the payments to influence federal transactions, and the Drug-Free Workplace Act. The spirit of reform is fully embraced with the inclusion of this section.

International Competitiveness

In the area of global and international measures, we are pleased to see the long-called-for provision in the bill repealing recoupment of non-recurring costs. In the highly competitive global marketplace, recoupment often can mean a 20%–30% competitive disadvantage to U.S. companies. With such a disadvantage, U.S. companies lose sales opportunities, resulting in a loss of U.S. jobs, less U.S. defense capability, and ultimately a higher cost to U.S. taxpayers for defense products. The repeal of this statutory requirement will enhance the competitive capability of international defense manufacturers.

Procurement Integrity

Enactment of the changes in H.R. 1670 will go a long way toward achieving a truly streamlined reform in ethics, conflict-of-interest statutes, and redundant post employment laws. ARWG supports the provisions repealing onerous Procurement Integrity statutes and replacing them with broad protections of source selection and proprietary information. The result of this change is certain to be a movement toward more healthy, open, and substance-based communications between the buyer and seller, which has been unduly inhibited in recent years.

CLOSING STATEMENTS

In some of our recommendations, we have violated to some degree, our own and your aversion to being overly prescriptive in statute to the Executive Branch. I assure you that our movement in this direction, over the years, is a result of our real-world experience with the conversion process from law to regulations. The trend in the implementation of FASA regulations is a case in point, where the regulation writers have proven to be very conservative and traditional in some of the key areas. In short, we believe specific guidance in certain areas is necessary to ensure a clear understanding by regulators of congressional vision and intent.

Let me conclude by saying that your Committees have really stepped up to the plate with this legislation. Clearly, you are looking to make a long-term mark on the acquisition system, to prepare it for the 21st century. On behalf of the industry organizations in ARWG, I truly appreciate having the opportunity to present our views and look forward to discussion on this promising legislation.

Mr. CLINGER. Now Mr. Ebner.

STATEMENT OF STANLEY EBNER, VICE PRESIDENT, WASHINGTON OPERATIONS, MCDONNELL DOUGLAS CORPORATION, FOR ARWG

Mr. EBNER. Chairman Clinger and Chairman Spence and Members of both committees, many of whose fortitude I really admire just for being here after last night, I am happy to be here representing not just McDonnell Douglas, which is also a fairly large corporation, but also ARWG as well. I am pleased to be here and appreciate the opportunity.

We certainly want to join Mr. Leto in commending your efforts on this legislation. We particularly want to commend the work of Ellen Brown and Robert Rangel, who are especially talented and qualified staff members who have put a lot of their hearts and souls into this legislation, not to mention what the Members have done, of course.

The Federal Acquisition Streamlining Act of 1994, which we all refer to now as FASA, was a significant first step in reforming the acquisition process. And we appreciate the fact that you have recognized that more remains to be done, and that is reflected in H.R. 1670.

Even with the passage of FASA, many of the ARWG member companies still won't sell certain items to the Federal Government. It is this large segment of the business base as well as the artificial separations between Government and commercial segments of the same company which need to be addressed by future legislation and which you are addressing.

We also applaud your interest in and your oversight of the regulatory implementation of FASA. Your staff, in particular, has understood that even the strongest legislative language can lose its impact, or even its meaning, during implementation.

As a representative of the defense industry, I would like to particularly focus my remarks today on opportunities and need for changes in the defense acquisition process. We must ensure that we continue to produce the world's highest quality weapon systems at affordable prices, something reduced defense budgets and increasing complexity make more difficult today.

In view of the continuing drawdown in defense spending which began in the late 1980's and which Chairman Spence and his committee are making every effort to stabilize—an effort which we applaud—nevertheless, industry is certainly being challenged to provide weapon systems at the lowest cost to American taxpayers. Just as we are redesigning our military for the future, we have to rehabilitate our acquisition system for the 21st century, and that means radical change. We are wasting too many precious dollars on the acquisition system and bureaucracy that could be spent to better equip men and women of our armed forces.

I would like to, as Mr. Leto did, address a few features of the bill that you have introduced. On international competitiveness, we strongly support your proposal to repeal the statutory requirement for recoupment of nonrecurring research and development costs for weapon systems sold through the FMS program. It won't be a surprise to you that we support it, but we think it is a meaningful effort.

It is not going to result in more weapons sold around the world. What it is going to do is give U.S. manufacturers an opportunity to compete on a more level playing field. As you well know, both the Bush administration and the Clinton administration have supported repeal; and we certainly strongly endorse it.

On the elimination of certification requirements, most of the certifications now required amount to a written promise that the contractor is complying with some statute. We view that as quite redundant because they simply provide a written confirmation that a contractor is complying with the written law of the land, which we all should be doing now. Certification requirements like this only add time, effort and thousands of pieces of paper to an already overburdened system. We strongly support removal of these and all other nonvalue-added administrative burdens.

I know you are aware of the Coopers and Lybrand/TASC study that was recently done for the DOD, and it concluded that administrative burdens add at least 18 percent to the cost of weapon systems. The DOD regulatory cost premium is significant and may be reduced without sacrificing accountability for public funds.

In addition, that survey didn't address all sources of nonvalue-added costs, and we know you are going to look at those as well. We think a clearly significant savings could result from a reduction in a lot of these nonvalue-added activities.

On commercial practices in FASA, you supported the use of commercial acquisition practices; and this year you go even further toward opening up the commercial marketplace to the Government and its contractors. We support this approach. It will help us eliminate some of the barriers we have in dealing with our own subcontractors and being able to have access to the latest commercial technology that is available.

In conclusion, I want to thank you again for this opportunity and for your attention. We are enthusiastic about your efforts to further simplify and streamline the Government acquisition system, both in areas I have mentioned and in those discussed by Mr. Leto, and I am sure, by the other panelists.

As the defense budget continues to decline, we need to do everything possible to reduce costs while gaining access to the latest technology. I will point out, however, that H.R. 1670 was only introduced a few days ago, 85 pages long, which isn't long by today's standards. I am a slow reader, and I expect that we will have more information, advice, and suggestions to the committees as they proceed. We will be looking forward to working with you and your staff in order to accommodate our shared objectives.

Thank you again for the opportunity. If there are questions, I will try to answer them.

Mr. CLINGER. Thank you. We will look forward to hearing your further comments and suggestions as you have an opportunity to digest the 85 pages.

We also want to thank you for the extraordinary effort you made to be here this morning. We appreciate that very much.

[The prepared statement of Mr. Ebner follows:]

PREPARED STATEMENT OF STANLEY EBNER, VICE PRESIDENT, WASHINGTON OPERATIONS, MCDONNELL DOUGLAS CORPORATION, FOR ARWG

Chairman Clinger and Chairman Spence and Members of the Committees, I am Stanley Ebner, Senior Vice President for Washington Operations, McDonnell Douglas Corporation. It is a pleasure for me to respond to your request to testify before you on acquisition streamlining and simplification. I am here today on behalf of the Acquisition Reform Working Group (ARWG), a consortium of nine associations which represent thousands of companies and individuals associated with the business of government contracting.

We want to commend both of you for your strong leadership in pursuing meaningful Federal acquisition reform. The Federal Acquisition Streamlining Act of 1994, commonly called FASA, was largely the result of your Committees' committed and diligent efforts, and it was a big step toward the long overdue simplification and rationalization of the complex, redundant, and time-consuming government acquisition process. More importantly, you have recognized that much more remains to be done, and we appreciate this opportunity to comment on the next step of acquisition reform that you are proposing in H.R. 1670.

Even with the passage of last year's legislation, many of the ARWG member companies still will not sell certain items to the Federal government. It is this large segment of the business base, as well as the artificial separations between government and commercial segments of the same company, which have to be addressed by future legislation.

We also applaud your interest in, and oversight of, the regulatory implementation of FASA. Your staff, in particular, has recognized that even the strongest legislative language can lose its impact if not properly implemented.

As a representative of the defense industry, I would like to focus my remarks today on the opportunities and need for additional changes in the defense acquisition process. We must ensure that we continue to produce the world's highest quality weapons systems at affordable prices.

In view of the continuing drawdown in defense spending, which began in the late 1980s, industry is being challenged to provide needed weapons systems at the lowest cost to American taxpayers. Just as we are redesigning our military for the future, we must also rehabilitate our acquisition system for the 21st century. It is time for a radical change in the acquisition process—because it simply costs too much. We are wasting money on the acquisition bureaucracy that we could be spending to better equip the men and women of our armed forces.

I would like to turn my attention now to several of the specific proposals included in your bill, H.R. 1670, the Federal Acquisition Reform Act of 1995.

INTERNATIONAL COMPETITIVENESS

We strongly support your proposal to repeal the statutory requirement for recoupment of non-recurring research and development (R&D) costs for weapons systems sold through the Foreign Military Sales (FMS) program. Recoupment charges raise the price of U.S. products and make American companies less competitive. Repeal of recoupment does not mean that there will be more weapons sold in the world; it merely means that, once a country has decided to purchase a military product, U.S. manufacturers will compete on a level playing field. Both the Bush and the Clinton Administrations have supported the repeal of this law.

ELIMINATION OF CERTIFICATION REQUIREMENTS

Your bill provides for the elimination or cancellation of the majority of current certification requirements. Most of these certifications amount to a written promise that the contractor is complying with some statute (i.e., the Clean Water Act). These certifications are redundant because they simply provide a written confirmation that a contractor is complying with the law of the land. Such certification requirements only add thousands of pieces of paper to an already overburdened system. We strongly support the removal of non-value-added administrative burdens.

A recent study done by Coopers and Lybrand/TASC (The Analytical Sciences Corporation) for the Department of Defense concluded that administrative burdens add at least 18% to the cost of weapons systems. The DOD regulatory cost premium is significant and may be reduced without sacrificing full accountability for public funds.

It is important to recognize that the study did not address all of the possible sources of non-value-added costs; the actual cost premium may be far greater than 18%. Whatever the exact amount, a significant savings could be achieved if we were

able to identify and free-up all of the monies that are now devoted to unnecessary oversight and reporting requirements.

COMMERCIAL PRACTICES

In FASA, you emphatically supported the use of commercial acquisition practices for the purchase of goods and services by the government. Your bill goes even further this year toward opening the commercial marketplace to the government and to its contractors. We support this approach, particularly as it eliminates the barriers that currently deny government prime contractors access to the latest commercial technology.

CONCLUSION

I would like to thank the Committees again for the opportunity to testify today and for your kind attention. We are enthusiastic about your on-going efforts to further simplify and streamline the government acquisition system, both in the areas that I have mentioned and in those discussed by my fellow panelists. As the defense budget continues to decline, we need to do everything possible to reduce costs while gaining access to the latest technology.

I will point out, however, that H.R. 1670 was only introduced a few days ago, and we would like to have an opportunity to study the bill in depth before finalizing our position on specific issues. We will be pleased to work with you and your staff to ensure that we have the most effective legislative language to accommodate our shared objectives.

I'll be happy to answer any questions that you might have.

Mr. CLINGER. Now I would like to recognize Mr. Cypert.

STATEMENT OF EDWARD CYPERT, VICE PRESIDENT, OPERATIONS, SPACE AND ELECTRONICS GROUP, TRW, INC., FOR ARWG

Mr. CYPERT. Good morning, Chairman Clinger and Chairman Spence, Members of the committees. I am Ed Cypert from TRW Space and Electronics in Redondo Beach, so a special hello to Mrs. Harman, our wonderful representative. I am here also on behalf of ARWG and all companies that are represented through ARWG.

So I want to address some of the features of H.R. 1670, that we think are particularly important to us on the aerospace and defense side. Certainly, the passage of FASA 1994 was an important first step, and you have recognized that we have a lot more to do to reach the kind of reform that is so important to all of us.

Title I of the bill would replace the current requirement for full and open competition with a requirement for maximum practicable competition. We support this concept, particularly as procurement budgets decline and it becomes increasingly important for agencies to carefully husband our resources.

Full and open competition does not guarantee the lowest-price or the best-value award but often requires the mailing of dozens and even hundreds of solicitation packages to interested would-be offerors, only a fraction of whom respond with offers. Giving the contracting officer the ability to exercise more discretion and seek meaningful competition is clearly in conformity with the goal of changing the acquisition culture.

Full and open competition is not routinely applied in the commercial marketplace. If the Federal Government is to become a world-class buyer and to make greater use of commercial products, its buyers should be given the same flexibility that is now practiced in the commercial world.

ARWG strongly endorses the provision of the bill that would establish simplified procedures for the purchase of commercial items

and would exempt commercial purchases from TINA, the Truth in Negotiations Act, requirements for cost and pricing data, post-award audits and from cost accounting standards. These protections may be needed when the Government is buying unique items which would have no commercial equivalent, or products for which price reasonableness cannot be assured by the marketplace. However, they are virtually foreign concepts in the commercial world.

Again, if the Government wants to be a world-class buyer it should throw away these kinds of crutches and rely on the forces of the marketplace as well as the integrity and ingenuity of the Government workforce.

The bill does not address the several statutory requirements which still inhibit commercial suppliers from entering the Government marketplace. The Federal Acquisition Streamlining Act of 1994 exempted commercial products from many of these but failed to fully correct the problem created by requiring that purchases of commercial products comply with the Buy American Act, Trade Agreements Act, Cargo Preference Act and many others.

We recognize that waiving all of these will be very difficult, but we do believe that the Government will not achieve the goals it envisions with respect to commercial products until it recognizes the hurdle these provisions represent and steps up to the challenge of waiving them for all commercial transactions.

Someone once said you can't jump 70 percent across a chasm and be successful. We believe that aptly describes the dilemma we face today with respect to commercial items. The number of statutes for substitutes that have been waived are meaningless if it only gets us to the 70 percent point.

ARWG supports the intent of section 301 of the bill which would codify the long-standing Government policy of reliance on the private sector. However, we believe the language "rely on commercial sources," which was contained in the 1955 Bureau of the Budget Circular 55–4, needs updating. The use of the term commercial sources today, with the increased emphasis on commercial items, could be interpreted to mean only that part of the private sector which is engaged in commercial business.

Contracting out for the performance of commercial/industrial activities under current guidelines does involve principally commercial firms or commercial segments of aerospace and defense firms. However, neither these guidelines nor the language proposed in section 301 clearly address, for example, the problem represented by the current controversy over depot-level maintenance of defense hardware. This can be and should be performed by private sector contractors, even though those contractors in many cases might be 100 percent engaged in defense business and, therefore, not considered commercial.

Thus, we recommend that the language in section 301 be changed from commercial sources to private sector.

The last issue that I am going to address is section 302, which would prohibit the agencies from regulatorily imposing unnecessarily burdensome certificates not required by statute. The most recent tabulation of certifications required by the FAR and the Defense Supplement to the FAR is more than 100, the majority of which are not specifically required by statute.

The answer to every bad experience or shortcoming perceived in the contracting process often seems to be to add another certificate. It is time to stop this redundant, time-consuming, unnecessary cost overkill; and we applaud your committee for addressing this issue.

Section 302 goes a step further and repeals four statutory certifications which are considered redundant or otherwise unnecessary. We are in full accord with the spirit of reform embodied in this section.

In addition, ARWG is reviewing all of the statutory certifications to determine if there are still ones that can be repealed. We will forward these comments and our recommendations to you, and I believe that that will be forthcoming next week.

This concludes my statement. I appreciate the opportunity to address the committee on these important issues, and we look forward to working with you as this process continues. Thank you.

Mr. CLINGER. Thank you very much, Mr. Cypert. We appreciate your testimony.

[The prepared statement of Mr. Cypert follows:]

PREPARED STATEMENT OF EDWARD CYPERT, VICE PRESIDENT, OPERATIONS, SPACE AND ELECTRONICS GROUP, TRW, INC., FOR ARWG

Good morning, Chairman Clinger, Chairman Spence and members of the Committees. My name is Ed Cypert, and I am Vice President for Operations at the TRW, Inc., Space & Electronics Group in Redondo Beach, California. I am also Vice Chairman of the Procurement and Finance Council of the Aerospace Industries Association (AIA). I appreciate the opportunity to appear here today on behalf of the Acquisition Reform Working Group (ARWG). ARWG is comprised of nine associations, including AIA, representing some 4,000 large and small member firms. It was created informally two years ago to facilitate response by a broad segment of industry to various legislative proposals to reform the acquisition process.

TRW Incorporated is a $9 billion diversified international company that provides products and services with high technology or engineering content to automotive, space and defense, and information systems and services markets. TRW's space and defense segment includes software and systems engineering, and electronics systems and equipment, in addition to spacecraft.

I want to address in particular some of the features of the Federal Acquisition Reform Act of 1995 (H.R. 1670) which would have the greatest impact on aerospace and defense companies. Mr. Stan Ebner of McDonnell Douglas Corporation, who will be testifying a little later, will also address issues in this category. I commend both your committees for taking the initiative to continue the much needed reform effort that began with the creation of the Section 800 Panel over four years ago to review all DoD acquisition laws.

COMPETITION

Title I of the bill would replace the current requirement for "full and open" competition with a requirement for "maximum practicable" competition. We support this concept, particularly as procurement budgets decline and it becomes increasingly important for agencies to carefully husband their resources. Full and open competition does not guarantee the lowest price or the best value award, but does often require the mailing of dozens or even hundreds of solicitation packages to "interested" would-be offerors, only a small fraction of whom respond with offers. Giving the contracting officer the ability to exercise more discretion and seek meaningful competition is clearly in conformity with the goal of changing the acquisition culture. Full and open competition is not routinely applied in the commercial world. If the Federal government is to become a world class buyer and to make greater use of commercial products, its buyers should be given the same flexibility that is now practiced in the commercial world.

COMMERCIAL ITEMS

ARWG strongly endorses the provisions of the bill which would establish simplified procedures for the purchase of commercial items and would exempt commercial purchases from Truth in Negotiation Act requirements for cost and pricing data,

post-award audit, and from the cost accounting standards. These "protections" may be needed when the government is buying unique items which have no commercial equivalent, or products for which price reasonableness cannot be assured by the marketplace. However, they are virtually foreign concepts in the commercial world. Again, if the Federal government wants to be a world class buyer, it should throw away these kinds of crutches and rely on the forces of the marketplace as well as the integrity and ingenuity of the government workforce.

The bill does not address the several statutory requirements which still inhibit commercial suppliers from entering the government market. The Federal Acquisition Streamlining Act of 1994 exempted commercial procurements from many of these, but failed to fully correct the problem created by requiring that purchases of commercial products comply with the Buy American Act, Trade Agreements Act, Cargo Preference Act and many others. We recognize that waiving all of these will be very difficult, but we do not believe that the Federal government will ever achieve the goals it envisions with respect to commercial products until it recognizes the hurdle these provisions represent, and steps up to the challenge of waiving them for all commercial transactions. Someone once said you cannot jump 70% of the way across a chasm and be successful. We believe that aptly describes the dilemma we face today with respect to commercial items. The number of statutes that have been waived is meaningless if it only gets us to the 70% point.

GOVERNMENT RELIANCE ON THE PRIVATE SECTOR

ARWG supports the intent of Section 301 of the bill, which would codify the long-standing government policy of reliance on the private sector. However, we believe the language "rely on commercial sources," which was contained in the 1955 Bureau of the Budget Circular 55–4, needs updating. The use of the term "commercial sources" today, with the increased emphasis on commercial items, could be interpreted to mean only that part of the private sector which is engaged in commercial business. Contracting out for the performance of commercial/industrial activities, under current guidelines, does involve principally commercial firms, or commercial segments of aerospace and defense firms. But neither these guidelines nor the language proposed in Section 301 clearly addresses, for example, the problem represented by the current controversy over depot-level maintenance of defense hardware. This can be and should be performed by private sector contractors, even though those contractors in many cases might be 100% engaged in defense business and therefore not considered "commercial." Thus, we recommend that the language in Section 301 be changed from "commercial sources" to "private sector."

ELIMINATION OF CERTAIN CERTIFICATION REQUIREMENTS

The last issue I will address is Section 302, which would prohibit the agencies from regulatorily imposing unnecessarily burdensome certifications not required by statute. The most recent tabulation of certifications required by the Federal Acquisition Regulation (FAR) and the Defense Supplement to the FAR contains more than 100 certifications, the majority of which are not specifically required by statute. The answer to every bad experience or shortcoming perceived in the contracting process often seems to be to add another certification. It is time to stop this redundant, time-consuming, and unnecessarily costly overkill, and we applaud your committees for addressing this issue. Section 302 goes a step further and repeals four statutory certifications which are considered redundant or otherwise unnecessary. We are in full accord with the spirit of reform embodied in this section. In addition, ARWG is reviewing all of the statutory certifications to determine if there are additional ones which can be repealed. We will forward our recommendations on these for your consideration early next week as soon as this review is completed.

That concludes my statement. We appreciate the opportunity to address the Committees on these important issues and look forward to participating in the process whenever we can be of assistance.

Mr. CLINGER. I am pleased to welcome back before the committee Mr. Cooper.

STATEMENT OF MILTON COOPER, PRESIDENT, SYSTEMS GROUP, COMPUTER SCIENCES CORPORATION, FOR THE INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA

Mr. COOPER. Thank you, Chairman Clinger, Chairman Spence, Members of both committees.

As Mr. Davis stated, I do head Computer Sciences Corporation's Federal Systems Group. Our corporate headquarters, I am happy to say, are in El Segundo, Mrs. Harman, and you represent us very well here. Thank you.

Today, I appear on behalf of the Information Technology Association of America. ITAA represents over 6,000 companies, large and small, who provide information-based solutions for our customers using computers, software and communications. Many of these companies, like my own, are vendors to the Federal Government.

ITAA is pleased with the bold, innovative, commercially oriented provisions contained in your legislation H.R. 1670, the Federal Acquisition Reform Act. Although ITAA has not had the opportunity to specifically review every provision in the bill, we do want to go on record today as strongly supporting its thrust and principal provisions. I would like to comment briefly now on several of those.

First, Government reliance on the private sector. We applaud the inclusion of this important policy in this bill. In these times of Government downsizing, severe budget reductions and pressures, the contracting out or outsourcing to the private sector is more necessary than ever. ITAA believes that DOD codifying this provision into this statute will provide the needed additional authority to see it fully implemented.

Regarding commercial item acquisition, ITAA has testified before the House and Senate on several occasions in support of the complete exemption of commercial items from the provisions in the Truth in Negotiations Act. While FASA offered some relief to those burdensome requirements, the draft regulations issued this spring, in our view, offered insufficient relief to vendors of commercial products.

We, therefore, strongly endorse this bill's removal of commercial items from the TINA requirement to provide the certified cost and pricing data. This bill will remove the single largest impediment, in our view, to commercial contractors in offering their products and services to the Federal Government.

We believe that these steps in this bill will give the Government a far broader access to the products and the services that are, in fact, evolving from our industry at a faster and a more cost-competitive rate than ever before.

With regard to consolidation of bid protest forums, we know that the current bid protest process has been the target of increasing criticism from both Government and industry. It is our position that the current protest procedures are only symptomatic of the weaknesses of the procurement system, a system burdened by a process that takes too long, costs too much and, unfortunately, often results in adversarial relationships between the contractor and its customers. Because H.R. 1670 addresses this larger picture, ITAA supports its key provisions in this regard.

We are strongly supportive of the debriefing provisions in FASA since we firmly believe that better debriefings will result in fewer protests. As Mr. Leto mentioned, vendors understandably want to know why they lost and if they were treated fairly. Timely and better debriefings and better communications will help accomplish this goal.

We also support the consolidation of the 11 administrative tribunals and the GAO and GSBCA into 1 independent board to resolve contract disputes and bid protests.

Our Association has a bid protest reform task group that has carefully reviewed all the pending bid protest proposals, and we have decided that three provisions are essential to industry: one, a stay or suspension of award so that if the protester wins the protest he has a chance of winning the business; second, discovery, although we support the use of reasonable limitations on the amount of discovery; and, third, giving protesters the right to supplement the agency record.

We are pleased to note that all of these key components are part of H.R. 1670.

With regard to procurement integrity, ITAA enthusiastically supports the changes in the procurement integrity rules as contained in H.R. 1670.

The provisions in this bill will focus on what we believe is the truly critical element, and that is the information to be protected, rather than relying on a complex system of certifications. As I stated, improved communications is essential, we believe, to the procurement process; and the provisions you are recommending will enhance greatly the communications process.

Finally, improvement of competition requirements. I would like to comment briefly here. We have not had sufficient time to address all the issues in changing to the current full and open competition standard, but we understand the objectives the sponsors hope to achieve, we believe, by this change; and we agree with it.

The move to maximum practicable competition complements the more recent move from the lowest bidder meeting minimal requirements to best-value awards, which is widely applied in Government and considers both technical merit and price. We remain concerned, however, that it may not be practical to limit the number of companies and probably would not be desirable to arbitrarily limit the number of companies who desire to bid or qualify for a specific solicitation.

We have a list of current unanswered questions, and we would take this opportunity to request an opportunity to further discuss and assess with the committee this competition change with you so that we could fully understand its implications, agree with its thrust and make appropriation comments and recommendations for the committee to consider.

In closing, I would like to commend the authors. These are times of change. We are happy that you are giving us a chance to be a part of this change process, and we thank you for this opportunity to present our views.

Mr. CLINGER. Thank you.

[The prepared statement of Mr. Cooper follows:]

PREPARED STATEMENT OF MILTON COOPER, PRESIDENT, SYSTEMS GROUP, COMPUTER SCIENCES CORPORATION, FOR THE INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA

Good morning, Chairmen Clinger and Chairman Spence and members of the National Security and Government Reform and Oversight Committees. I am Milton E. Cooper, President of the Systems Group of Computer Sciences Corporation, here today on behalf of the Information Technology Association of America. ITAA rep-

resents over 6000 direct and affiliate members across the country. These are information technology companies who build information-based solutions for customers, using computers, software, and communications. Many of these companies, like my own, are vendors to the federal government.

These are exciting times in the federal marketplace. The reforms started with the passage last year of the landmark Federal Acquisition Streamlining Act are continuing at a rapid rate. ITAA is pleased with the bold, innovative, commercially-oriented provisions contained in your legislation, H.R. 1670, the Federal Acquisition Reform Act. Although ITAA has not had an opportunity to consider its position on every provision in the bill in time for this hearing, we are able to go on record as strongly supporting most of the provisions in H.R. 1670.

I would like to review those provisions at this time.

GOVERNMENT RELIANCE ON THE PRIVATE SECTOR

While ITAA did not exist in 1955 when President Eisenhower signed the order that eventually became OMB Circular A–76, support for this policy has been a primary position of the Association for its entire 34 year history. ITAA has been disappointed that the intent of this policy—that the federal government rely on the private sector to supply its products and services—has not been fully implemented across all federal agencies. We, therefore, applaud its inclusion in H.R. 1670. In these times of government downsizing and budget reductions, contracting out, outsourcing, or privatizing to the private sector is more necessary than ever. ITAA believes that codifying this provision could provide the needed additional authority to see it fully implemented—after 40 years.

COMMERCIAL ITEM ACQUISITION

ITAA testified before the House and Senate on several occasions in support of the complete exemption of commercial items from the provisions of the Truth-in-Negotiations Act, commonly referred to as TINA. While FASA offered some relief to its burdensome requirements, the draft regulations issued this spring did not represent Congressional direction and policy. They were overly complex, confusing, and, in the end, offered little relief to vendors of commercial products.

ITAA, therefore, strongly endorses the bill's removal of commercial items from the TINA requirement to provide certified cost and pricing data. Further, by coupling this provision with the deletion of the government's right to audit transactional sales data provided by a contractor to support proposed prices, this bill removes the single largest impediment to commercial contractors in offering their products and services to the federal government.

ITAA commends you and the co-sponsors of this legislation for taking this bold, but necessary step. By doing so, you will attract more commercial vendors to the federal marketplace, cut costly delays and red tape, and best of all, give the federal government customer access to new and innovative products and services, faster and more affordably than ever before.

CONSOLIDATION OF BID PROTEST FORA

ITAA recognizes that the current bid protest process has been the target of increasing criticism from government and industry alike. It is our position that the current protest procedures are symptomatic of the weaknesses of the procurement system. This system is burdened by a process that takes too long, costs too much and, unfortunately, often results in an adversarial relationship between contractors and customers. Because H.R. 1670 addresses this larger picture, ITAA is ready to support this key provision.

We were strongly supportive of the debriefing provisions in FASA, since we firmly believe that better debriefings will result in fewer protests. With often millions of dollars invested in a particular procurement, you can understand why vendors want to know why they lost and if they were treated fairly. Timely debriefings and better communications will help accomplish this goal.

Now ITAA supports the consolidation of the 11 administrative tribunals and the GAO and GSBCA into one independent board to resolve contract disputes and bid protests. We have a bid protest reform task group that has carefully reviewed pending bid protest proposals, and we decided as an Association that three provisions were essential to industry:

- Suspension—the stay of an award, so that if the protector wins the protest, it also has a chance of winning the business;
- Discovery—although we support the use of reasonable limitations on the amount of discovery; and
- Augmentation—giving protectors the right to supplement the agency record.

I am pleased to note that all of these key components are part of H.R. 1670. We again commend the sponsors for their innovative effort to improve the procurement process and yet allow contractors who have legitimate concerns to get a fair hearing through the creation of the United States Board of Contract Appeals (USBCA.)

PROCUREMENT INTEGRITY

ITAA enthusiastically supports the changes in the Procurement Integrity rules as contained in H.R. 1670. The "chilling" effect of this law caused by the misunderstanding of its provisions has had a detrimental effect on government-industry relationships. Fearful of being in violation of this complex statute, many government officials have chosen to say as little as possible to industry.

The provision in H.R. 1670, which has had support of two Administrations, would focus on the critical element—information that is to be protected—rather than rely on a complex system of certifications. Because current law is so confusing, interpretation varies greatly from agency to agency. This is particularly difficult for vendors operating government-wide. It seems to industry that the designation of a "procurement official" at some agencies includes everyone except the person at the guard's desk. Improved communication is essential to the procurement process, and the provisions you are recommending will greatly enhance industry-government relationships.

IMPROVEMENT OF COMPETITION REQUIREMENTS

Let me comment briefly on Title I, the competition aspect of the legislation. While ITAA has not had sufficient time to address all the issues involved in changing from the current "full and open" competition standard, we understand the objectives that the sponsors hope to achieve by this change. The move to "maximum practicable competition" complements the recent move from the "lowest bidder meeting minimal requirements" to "best value" awards which considers both technical merit and price in determining best value to the government, and, to more "commercial-like" contracting practices. Some member companies are concerned, however, with the process of limiting the number of companies who desire to bid or qualify for a specific solicitation.

In our discussion of this provision, several questions were raised that we were currently unable to answer, such as:

How will companies compete for a place on the verified vendors list?

Will it be standardized across agencies?

To what segment of government-procured goods and services will these provisions apply?

Will this limit the participation of smaller companies or new entrants?

What is the appeal process for companies failing to gain or losing their status on the qualified list?

One of our recommendations is that mandatory negotiated rulemaking be required so that industry can sit down with government regulation writers to discuss this critical provision. ITAA would like to discuss this competition standard change with you so that we can fully understand its potential impact on the IT industry.

There are many other provisions in H.R. 1670 which I do not have time to address in my oral statement. ITAA has some specific recommendations that they would like to direct to your staffs. We stand ready and willing to assist you in ensuring the passage of H.R. 1670.

In closing, I would like to again commend the authors of H.R. 1670 for their bold initiatives. These are indeed times of change, and with this legislation, you have demonstrated the will to shape a better procurement process. H.R. 1670 recognizes that as we move toward commercial-like procedures and increased use of commercial products and services, changes are also needed in the traditional acquisition process. ITAA believes that you have struck the right balance between streamlined procedures and a system that still offers opportunities and safeguards to competing firms.

ITAA again thanks you for the opportunity to present our views.

Mr. CLINGER. I would thank all the panelists for complying with our 5-minute rule. We appreciate that very much. Thank you for your testimony. We welcome your offer to continue to work with us as we fine tune this legislation in the weeks ahead.

At this time, I would like to recognize the cosponsor of this piece of legislation, Chairman Spence.

Mr. SPENCE. Thank you, Mr. Chairman.

I, too, want to thank all of you for your statements. I just have one short question for Mr. Ebner and will allow time for others to ask questions.

Mr. Ebner, what would be the benefit to the Government of repealing recoupment of nonrecurring R&D costs?

Mr. EBNER. Well, Mr. Chairman, we believe that it would make us more competitive in the international marketplace. That will result often in more units sold, which will in turn reduce the unit price of those same units to the Federal Government. So we think there is a definite financial benefit to DOD as well as the benefit which derives to the whole Government, including our economic base, of keeping us competitive in the international marketplace as well.

Mr. SPENCE. Thank you.

Mr. CLINGER. Thank you very much.

I am pleased to recognize the ranking member of the Government Reform Committee, Mrs. Collins.

Mrs. COLLINS. Thank you, Mr. Chairman.

I looked at this bill in a very quick fashion, and I don't have any idea what this bill means by maximum practicable competition. Could each of you define that for me please? Mr. Leto?

Mr. LETO. Let me start by qualifying my answer somewhat in terms of my experience base.

I have spent 10 years working in the Federal Government applying my company to the Federal acquisition rules. Prior to that, I spent 20 years in the commercial sector. And, frankly, companies today divide their companies into two pieces. One piece of their company deals with the Federal Government, because the rules for acquisition are very, very different, and one with the commercial marketplace.

Suffice it to say that in any major procurement I have ever been involved in in the commercial marketplace, maximum practicable competition means selecting a short list of very qualified bidders and then putting those bidders to the rigors of a test to meet my requirements as a buyer.

Wide-open competition in the Federal Government causes a lot of things to occur. I routinely in my company spend anywhere from a million dollars to $12 million bidding a procurement. By definition, some of the regulations and specifications that are embedded in the procurement process or in the RFP itself, by definition, limits the number of bidders that can play. When I have to spend $12 million to bid a procurement, there aren't very many people wanting to belly up to that bar. By definition, it precludes participation by small companies.

Mrs. COLLINS. You did—give me your definition one more time. You clouded it with all the rest, $12 million. Tell me what it is, please.

Mr. LETO. I think maximum practicable competition is a representation of several companies, not just one or two, who meet the qualification tests that are mandated by a procurement. That qualification test is embedded in the technical specs of that RFP, and not all bidders are qualified to bid certain kinds of projects, and the rules to determine what those qualifications are need to be defined in this bill.

Mrs. COLLINS. Mr. Ebner, would you define for me the maximum practicable competition, what that means in this bill, please?

Mr. EBNER. I don't know whether I can give you a precise definition, because I think that will depend on how it is implemented by regulation, but I subscribe generally to what Mr. Leto said. I think it means allowing the marketplace that exists to determine who the real competitors are.

We have in our business both a commercial side and a military side, and all I can tell you is the manner in which we determine what subcontractors or suppliers are going to be competitive for components to our commercial aircraft is a lot different than what we are required to do in terms of military procurements. It is simpler, more efficient and more limited, but no less effective.

Mrs. COLLINS. Mr. Cypert.

Mr. CYPERT. I would echo that same comment.

We are also heavily in the commercial marketplace, and essentially what happens is you start off with a requirement and you are looking for those companies long term that are going to meet over-the-horizon requirements that you have and are going to be part, essentially, of your production line, part of the infrastructure that your company keeps in order to sell its products and services commercially.

Once you establish that and find what that competitive level is and hone that back in on your requirements, then you maintain that and it becomes, in essence, this short list. You don't go back out time and time again exploring the marketplace unless you have a requirement change.

The major difference I see there is defining your requirements precisely, the terms around which you are going to do the procurement, and then selecting those companies that are most qualified for that and letting it roll out of that process.

Mrs. COLLINS. So your definition of maximum practicable competition is defining it properly. In order to get to that maximum practical competition, you have to define what it is that it means.

Mr. EBNER. Yes.

Mrs. COLLINS. Mr. Cooper.

Mr. COOPER. In my view, maximum practicable competition is an outcome, not an initiation.

Mrs. COLLINS. Outcome.

Mr. COOPER. And that outcome is the inclusion in the final competitive process only of those bidding vendors who have a reasonable opportunity to be awarded the business. I believe very strongly that it serves neither industry nor Government well to artificially retain in a competitive environment companies who in fact have no reasonable chance to win.

So if the outcome is targeted toward restricting your competition to the maximum number of practicable winners, then I believe that that is something that absolutely serves both Government and industry well. As I indicated in my comments, this is the area that ITAA believes needs substantial additional discussion to determine how you arrive at that outcome.

There is a process that leads to the proper outcome that I believe both parties want, but it is that process, Mrs. Collins, that I think needs additional discussion.

Mrs. COLLINS. Thank you very much.

We have by definition, or lack thereof, a short list. We say that maximum practicable competition needs to be defined. We need to define what the requirements are. We need to define who the real competitors are, and now we talked about a targeted outcome. I hope that we will be able to settle this in some kind of fashion before we pass this legislation.

I see the yellow light is on and I yield back the balance of my time, Mr. Chairman.

Mr. CLINGER. I thank the gentlelady.

Mrs. COLLINS. Now that we know what it means.

Mr. CLINGER. And, at this point I would like to recognize the chairman of the Government Management Subcommittee, Mr. Horn, the gentleman from California, for 5 minutes.

Mr. HORN. Just a brief question. We all recognize our intent is to decrease costs for Government and industry and ensure acquisition of quality products at reasonable prices. That has to be the goal.

I have listened with care to your testimony and each of you have heard the other. Are there any points that were made by other members of the panel that any of you—with which you disagree?

I am just curious. You have heard each other. So you are united on what each other has said here?

Mr. COOPER. I believe so.

Mr. HORN. I see heads nodding up and down. In India that might mean no, but here it means yes.

Now, then the question is, given the time situation, is there anything else that comes to mind that you think will help us achieve that basic goal? Quality products, reasonable prices, simplification of the process. What else comes to mind that we haven't gotten into this morning?

Nothing comes to mind. OK.

Obviously, when you go back and talk to your staffs, we would like to hear any ideas you have. This is not expected to be definitive.

You are absolutely right on the certification problem. That is going to be a very difficult issue to deal with.

Mr. CYPERT. One issue that does come to mind is the point of open discussion between Government and industry on the requirements issues. It seems like when we have an opportunity to sit down and discuss the requirements and to find what the requirement base is going to be where, we understand it on both sides, both what is going to be imposed and what is going to be built leads us into a position where not only is the process shortened, but the response is better, it is more on target, you can get to the price and the performance that you want. And so we think that if we could move toward this open discussion process, it would greatly help the procurement process.

Mr. HORN. Very good.

Any other comments?

If not, I thank you all for coming. We appreciate the advice.

Mr. CLINGER. I thank the gentleman.

And now I am pleased to recognize the gentlelady from New York, the ranking member of the Government Management Sub-

committee, Mrs. Maloney, and announce that I would next recognize Mr. Bateman, and then Mrs. Harman.

Mrs. MALONEY. I would like to thank you all for your testimony and ask you, the current standard of full and open competition, has it provided all of you a fair opportunity to compete for Federal contracts?

Mr. COOPER. May I start?

Mrs. MALONEY. Yes.

Mr. COOPER. I believe the answer—and now I have not my ITAA hat on, I have CSC—the answer is yes. But the range of goods and services that the Government procures makes that answer quite different, I believe, if you were able to query every industry head who sells or desires to sell. That I believe is the complexity of the issue.

Mrs. MALONEY. But doesn't the current system of full and open competition provide the Government with the latitude to eliminate businesses or bidders that are not capable of meeting the requirements?

Mr. LETO. Could I respond to that?

Mrs. MALONEY. Sure. It is an open question to anyone.

Mr. LETO. I think the process is in place to allow that to occur, but the process occurs only after you are well into the procurement cycle, and you are literally, you are literally precluded from continuing to the basis of an assessment of your bid as either not meeting the specification, or outside the cost thresholds. And as a consequence, before that ever occurs, a lot of money is spent, both on behalf of the Government and on behalf of the private sectors participating in these bids.

Mrs. MALONEY. You are precluded because of—what did you say? You are not meeting the cost and you don't have—the two reasons that you gave?

Mr. LETO. Typically when companies are excluded from continuing to participate in a bid in an open competition, that participation ceases well into the competition when it is determined by the Government that the bidder is not qualified to continue in the bid, either because they can't meet the technical specifications, or they are outside of the boundaries of the cost thresholds; or their management volume doesn't comply with what the Government is looking for.

When that decision is made, typically that company has spent an awful lot of money at that point in time participating in the bid process. Many of these decisions could be made right up front.

Mrs. MALONEY. Have you ever been precluded from bidding on a Government contract? Have they said that you were not qualified, that you did not meet the criteria?

Mr. LETO. Yes.

Mrs. MALONEY. Do you feel that it was unfair?

Mr. LETO. It was just prior to going to BAFO when I had already spent hundreds of thousands of dollars, and I was offended by it. Had I been told that at the front end, I would not have continued to participate. I don't routinely bid contracts that I don't think I have a high probability to win. Our bid and proposal dollars are very precious to us.

Mrs. MALONEY. But wouldn't you agree that it is a great deal of power for someone to decide what is the maximum practical competition since no one—all of you had a different definition.

My question is, do you think it would be better if Government, or that we defined it in this legislation as opposed to leaving it up to the administration or to each different contracting officer that may have a different standard? Don't you think it would be better to have a uniform standard, both for the private sector and for Government, and for the citizen taxpayer?

Mr. EBNER. If I can respond, Mrs. Maloney, I think ultimately when you have regulations, you are going to have a standard. I think that is the issue we have been discussing what the standard is.

If you have a standard that actually requires a full and open competition to the point where you get situations where you enter competition for competition's sake instead of trying to get the best product or service for the least amount of money for the Government, then you have artificial situations created. You have things like technology transfer; you have other things where the Government's objective is to create a competitive situation in the marketplace where perhaps one did not exist or wouldn't exist.

So what we are talking about here is a difference in the standard. The same judgment for regulations is going to be brought in terms of who is a qualified bidder and who isn't. But, as Mr. Leto said, if it can be done earlier on so people who are truly peripheral don't get involved, you are making it a simpler process, you are reducing the cost to the Government, and therefore, the cost to us who have to bid on this, because we all absorb the cost of the competition.

Mrs. MALONEY. Well, my point is that this is such a vague definition that there are other ways to do it, possibly to have thresholds at the beginning, the lowest qualified bidder so Government can disqualify those who do not meet the standard or don't have the proper technology or whatever.

Mr. EBNER. I don't think anybody at this table would dispute, Mrs. Maloney, that it requires definition. We, at least I personally, didn't view what was in the bill as a definition; it is more a principle or a change in standards from which you would have to derive a definition. I think we are in agreement that it does require further definition. But I think the principle—the one that we have been speaking to—is very important.

Mrs. MALONEY. Well, possibly could each of you supply your—in writing, recommendations of what the standards should be.

Mr. LETO. Yes.

Mrs. MALONEY. I think that would be helpful to us. Thank you. I yield back the balance of my time.

[The information referred to follows:]

PROPOSAL FOR MAXIMUM PRACTICABLE COMPETITION

These proposals are predicated on the following basic premises and assumptions:

1. The system should retain the attributes of an open and fair competition without causing offerors to spend scarce B&P dollars when they obviously have no chance of winning the contract award.

2. No qualified offeror should be cut out of a competition without his consent.

3. In the interest of maintaining a level playing field, no changes should be allowed to the solicitation once it is issued; certainly, no changes should be allowed after a down-select decision has been made.

Our recommendations for "maximum practicable competition" envision a two-phase approach that we believe will be fairer to prospective bidders without adding to procurement lead time:

PRE-OFFER PHASE

Step 1: The buying office posts a notice of intent to issue a solicitation (including (a) a reasonably detailed synopsis of the requirement, (b) a listing of the criteria on which the initial down-select and the final source selection decision will be based, (c) a notice that interested companies must submit to the agency a brief statement of interest and of their qualifications, and (d) a statement of the agency's intent to limit the competitive range in the post-offer phase).

Step 2: Any interested parties will respond to the notice with the brief statement of interest and of their qualifications.

Step 3: The buying office conducts its initial evaluation of the statements of interest received and issues to each company involved an advisory opinion, based on the baseline criteria in the notice of intent, to each company not deemed to be a viable competitor for each requirement.

Step 4: The buying office issues a solicitation to:

(a) All companies that, based on the initial screening, are deemed to have a reasonable chance to be the successful offeror; and

(b) Those companies that were given a notice that they are not deemed to be viable competitors if companies still wish to proceed and request a solicitation.

(A company that did not respond to the initial notice of intent may still request a solicitation at this point, but the buying office is under no obligation to consider its proposals.)

POST-OFFER PHASE

The buying office may evaluate proposals and eliminate certain offerors, as long as (a) it is done in accordance with the criteria specified in the notice of intent and in the solicitation and (b) an immediate debriefing is made available to each offeror so eliminated. We believe that this elimination should be protectable.

Mr. CLINGER. I thank the gentlelady.

Now I am pleased to recognize the gentleman from Virginia, Mr. Bateman, for 5 minutes.

Mr. BATEMAN. Thank you very much, Mr. Chairman.

Thank you, gentlemen, all of you, for your testimony this morning.

I, like you, only more so, am not in a position to have read and analyzed all of the proposed bill, H.R. 1670. But in addition to reading through your prepared statements, I have looked at section 301, Government reliance on the private sector, section 17, where I read: "It has been and continues to be the policy of the Federal Government to rely on commercial sources to supply the private end services the Federal Government needs."

That is rather strange statutory language. I am not even sure I know what its legal implication is. Certainly it is not an accurate statement to say, it has been the policy of the U.S. Government to do that, because we have Government depots and maintenance facilities owned and operated by the Federal Government providing services to the Federal Government, and a lot of contentiousness that exists between the private sector and that public sector. So I am curious that the language it has been in terms of the reality.

I am also curious as to what this language means prospectively if the legislation is enacted in this form. Does it, in fact, mean that all Government maintenance depots, public shipyards and such facilities are going to disappear?

Mr. COOPER. Mr. Bateman, I might start. It clearly is the practice in our markets that we addressed to that additional emphasis of consideration of commercial off-the-shelf products, for example. Commercial products in lieu of militarized products, for example, is more intensely considered, if you will.

As I stated in our ITAA summary, I believe that this bill further accentuates the thrust that I believe in fact reality presents in the market today that custom developed hardware, software, what have you, is not the most cost-effective way for the Government to proceed if a commercial product that meets the requirement is available.

So what I see, and I will put on my CSC hat again now, is that we design solutions for the solicitations to which we respond. We are working harder to see if there are commercially available products, hardware or software, that we can design into our solution rather than developing them ourselves. It makes us more cost competitive. It typically makes us more functionally competitive.

Mr. BATEMAN. Anyone else have an observation?

Let me just throw out for you that I am here this morning with some bruises on my left and on my right from trying to be the honest broker between those who wanted everything done in public facilities in the way of repair work for defense weapons systems and programs, while on the other side I have the bruises from those who wanted it all, absolutely 100 percent done in the private sector, close them up.

We have in the defense authorization bill some language that seeks to effect a reasoned compromise that will invite greater, more robust participation by the private sector while at the same time preserving some central core of work that would continue to be done for national security reasons in a reduced, but viable Government depots operation.

I would invite your attention to those provisions and hopefully if you don't find them eminently agreeable, you will find them a heck of a lot more agreeable than what you have dealt with in the past.

Thank you all.

Mr. CLINGER. I thank the gentleman for that comment and those questions.

Now I am pleased to recognize the gentlelady from California, Ms. Harman for 5 minutes.

Ms. HARMAN. Thank you, Mr. Chairman. And thank you, my Chairman, Mr. Spence.

I would like to note for the record that late last night, I think I was awake at the markup of the defense authorization bill. Some of the issues contained in this legislation were adopted. I am very excited about that and I am excited to be at this joint hearing and very enthusiastic about this legislation. It is also a pleasure to show all of Washington how talented my constituents are—you have done very, very well this morning.

I have just a request for more information—I suppose that is what I would call it—that I think could be helpful later on in these hearings. I read ahead a little bit, and have looked at the statement of Steven Kelman, who is the Administrator for Federal Procurement Policy and a friend of mine. He is a very talented man; he is commenting on behalf of the administration on this legisla-

tion; and he is quite positive, I want to tell you. I don't want to tip his hand, but his more cautious comments relate to the bid protest provisions of this legislation.

I thought it might be useful for those of you who live through this under existing law to tell us a little bit more of the problems with the current bid protest policy so that that can be on the record providing some background when Mr. Kelman speaks. I would just like each of you to respond to that.

Mr. Leto.

Mr. LETO. You are looking at me.

Ms. HARMAN. Well, you are first up.

Mr. LETO. Let me first say that the rules that apply to GSBCA are well understood by my company, and we play by those rules, and the GSBCA is—if we had a GSBCA like national centralized procurement authority, I would heartily endorse that, and I heartily endorse the rules that are around GSBCA.

As a company, I don't always have to use GSBCA; I can use GAO or court systems or appeal directly to the agencies. I have a variety of avenues that I can pursue, all of which are very disruptive and all of which cost money. Depending upon the type of procurement and depending upon my perception of my ability to win a protest and relative to my budget, I decide which protest vehicle to use if in fact it is appropriate.

I think we need to shut that down. I think as a first step in a protest environment, there ought to be an ADR kind of a front end that basically gets the parties together and attempts to resolve the dispute in short order with very strict rules that apply to the dispute, and an arbiter who truly doesn't represent the side of either. And if in fact the arbiter decides that this is a weighty issue and that it should be litigated, you go to the next step, and that the rules are guides and they are the same for everybody.

Right now, the rules as we describe them, are based upon our intent. I have seen procurements that have been delayed for as much as 18 months as a result of using a variety of protest vehicles, and I think it is criminal. And I think it does not serve the best interests of the Government.

Ms. HARMAN. Thank you.

Mr. Ebner.

Mr. EBNER. There is no question the process can be improved. I basically agree with what Mr. Leto said. Protests are interesting. The winners don't like them very much, and the losers are more inclined to consider them seriously.

It is a complex, burdensome process that does result oftentimes in an acquisition losing momentum, and it therefore produces unfortunate results for the Government in terms of acquiring the end product.

I would be happy to submit from the point of view of the company our comments for the record in terms of what might be done to improve the process.

Ms. HARMAN. OK. Thank you.

Mr. Cypert.

Mr. CYPERT. Just a little different twist. I think one of the issues that we face as you get into the bid protest process is we don't seem to get adequate debriefings at the time that the award is an-

nounced, and I think if we had a process that allowed us better insight into why the decision was made and what those issues are, it would certainly make it a lot easier for the companies not to step right into a protest because you often are blind at that stage because you don't know why the decision was made.

It looks like it was something that went against you and wasn't appropriate in the light of the RFP, but you couldn't really tell because the debriefing was so sketchy in that matter.

Ms. HARMAN. Thank you.

Mr. Cooper.

Mr. COOPER. I would just comment briefly that I believe that the ability to protest to determine why you lost and satisfy yourself that it was proper needs to be retained. This bill does that. I think the principal elements of centralization of the process that Mr. Leto mentioned is positive.

I think the emphasis on factual and timely debriefs is very positive, and the principles around expedited handling of certain of the protests will be beneficial. So the thrust is beneficial. It still needs to be tuned, if you will, and managed properly so it is not abused, which—like you, I have never heard of a winner protest. Maybe that will happen, but it doesn't usually, obviously. But we think the thrust of the bill is absolutely proper.

Ms. HARMAN. Thank you.

As a lapsed lawyer, obviously I am concerned about process, but I do think we need to simplify it. I think there are some good ideas on the table and I thank you all for coming.

Thank you, Mr. Chairman.

Mr. CLINGER. Thank you, Ms. Harman.

I am going to recognize Mr. Davis and then we will break for the vote which is in progress right now.

Mr. DAVIS. I just want to make a couple of comments, Mr. Chairman. I will try to be brief.

As we move to the term maximum practicable competition and the terms that go with that, it seems to me that you want to be fair to the bidders in this case who may be spending thousands of dollars for procurement they have no chance to win. And I don't see anything wrong with the Government giving an indication early on, saying for example, "Look, you can go ahead and bid if you want, but you are not likely to get it."

It seems to me, then, if somebody thinks that somehow they can break the mold and that they are going to be able to meet the requirements, they ought to be able to do that. But they ought to have some type of warning up front.

As you know, billions are lost, hundreds of millions of dollars are lost each year by companies that go after procurements that frankly they have no chance for. And sometimes if you find out early in the process, sometimes you find out later, and as Mr. Leto indicated, you wouldn't bid on some of these if you knew earlier you could get that early indication.

So I think that is what we are trying to effect here in a fair way. It is not that we are trying to exclude anybody, but you—I think companies want to know where they stand early on, and this would allow that.

Any reaction to that? Does that seem to meet what everybody is trying to say?

Mr. COOPER. Yes.

Mr. CYPERT. Yes.

Mr. EBNER. Yes.

Mr. LETO. Yes.

Mr. DAVIS. OK. The procurement integrity provisions, I just want to start with an anecdote. I agree with what everybody else has said, but I remember, Mr. Leto, working for your company going through one of these procurement decertification processes, and for us to certify—and this is how it works in the real world—for us to be able to give a proper certification to the Government that we do not have any outside knowledge of the procurement or any inside knowledge and the like. We had to go to everybody that worked on that procurement and get them to sign it. Because if you miss one person in the loop and somehow they miss something and the company signs a certification, you are liability.

There were like 80 people who worked in that procurement and you had somebody out of town for 2 weeks, and you try to work that through. It sounds great on paper when you are writing a bill, and look what we are doing, but as a practical matter, literally hours and hours of time are wasted, when if you take a look at what the results have been and the prosecutions that have resulted, there is a much easier way to get to the hub of the situation. I think that is what this act is trying to do.

Any reaction to that?

Mr. COOPER. Right.

Mr. DAVIS. So I think those are two areas where we can improve the situation, get the same end result, but not waste manpower and millions of dollars of industry time doing something where we can get the same result on a cheaper basis.

The only other question I wanted to ask is on the—this bill would provide the U.S. Board of Contract Appeals alternative means of dispute resolution for any disagreements in connection with a Government contract or prospective contract. Do you believe that providing these services for disagreements other than protests is beneficial?

Mr. EBNER. Yes, we do—I do.

Mr. DAVIS. OK. It is $10,000 a day, Mr. Leto talked about, if you go the full boat with the Board of Contract Appeals protest. What about a GAO protest? That is much cheaper.

Mr. EBNER. There is no reason why ADR couldn't work as well here as it does in other contentious situations.

Mr. DAVIS. OK.

Mr. LETO. I think ADR is also a great complement to the claims process in the Federal Government and for those of you who have not been involved in the claims process, we can literally spend 3 years chasing just a few million dollars' worth of money that we think is owed to us by the Government and never recover it, and spend a great deal of money in time and anxiety in the process of chasing it.

ADR offers a very simple vehicle with an unbiased decisionmaker as an arbiter to make a claims adjustment decision in a relatively short period of time, and I would heartily endorse that.

Mr. DAVIS. I would like to say that this is a distinguished panel. I appreciate what everybody has put into the mix here and I thank you for being here, and I yield back.

Mr. CLINGER. The committee will stand in recess for 15 minutes. [Recess.]

Mr. CLINGER. The committee will resume sitting. We will now ask our first panel to resume their seats.

The good news is that was the last vote of the day, so we won't be interrupted further during the course of this hearing. The bad news is, we still have many panels to listen to, so I want to move the process along as much as possible.

At this time I am pleased to recognize the distinguished gentleman from South Carolina, Mr. Spratt, for 5 minutes.

Mr. SPRATT. Thank you very much, Mr. Chairman.

I was just talking to Mr. Ebner about the recoupment issue. As I understand it, under the current law recoupment is a statutory requirement. Is it waivable in any circumstances?

Mr. Ebner, I will put the question to you, if you know, sir.

Mr. EBNER. Yes, sir, it is a requirement. Under current law, there is a waiver authority which can be exercised under certain circumstances. But more often than not, the requirement is exercised and required, and that is sort of the standard transaction.

Mr. SPRATT. What is the dollar amount or the percentage of unrecovered R&D? Is there a formula for determining it or is it negotiable or contractible?

Mr. EBNER. Yes, there is a formula.

Mr. SPRATT. It is a set formula, though? It doesn't vary from contract to contract?

Mr. EBNER. I don't think it does, no.

It is based on the nonrecurring R&D costs of the weapons system, and it really doesn't matter then how many weapons systems are sold. It is just spread across the buy. For example, just to give you an idea, on a recent sale we have made of F–15 aircraft to Saudi Arabia, the added cost to each F–15 was approximately $6.2 million, if I am not mistaken. So it is a significant cost.

Mr. SPRATT. Now, I raise the issue of something like the B–2 as an example of a technology that might not be available elsewhere in the world so that an American vendor selling such a plane would have something unique, and consequently there wouldn't be a question of making it more price competitive, because obviously there are not substitutes for everything. But why not say, or at least broaden the authority of the Department of Defense to waive recoupment in cases where it serves its own procurement interests, or in cases where it is necessary to make the American product price competitive, but at least retain the idea in those cases where we have a substantial investment and it is not likely to make a difference in the sale of a product.

Mr. EBNER. I guess from our point of view, Mr. Spratt, we would prefer to see the burden on the Government to establish that there is some special need to recoup the R&D on a particular transaction, rather than having it the other way around.

Mr. SPRATT. Let me switch to verified sources. One of my concerns is that we move from full and open competition and we go all the way to court litigation. We set up an exclusive club of sup-

pliers or providers of certain products that then make it extremely difficult for anybody else to enter it.

As I have read this, I wondered, would this bar A.J. Higgins? Do you know who I am talking about? When they asked Ike who won the war, he said, How about Andrew Higgins. Andrew Jackson Higgins was an unorthodox Navy competitor who not only built PT boats, he built LST's and everything else down in New Orleans. I think we want to keep these kind of entrepreneurs in the business and also keep the business accessible to people like that.

As I read the definition, the statutory definition of verification of sources, I found it kind of unsatisfying in the criteria it lays down. Can we get better criteria?

It says repetitive procurement. What is repetitive procurement? Would satellites be repetitively procured or are we talking about something much more repetitive and much simpler?

Mr. Cooper.

Mr. COOPER. I believe, Mr. Spratt, that that is precisely the question that we probably not very well articulated. But we do believe that there is substantial definition of the process that leads to what I previously called an outcome called maximum practicable competition. So I believe that is the single area, and I believe ITAA believes, that that is the single area perhaps in the entire bill that we hope for substantial additional discussion and definition on.

Mr. SPRATT. Well, let me ask about one particular area, because I looked for this and didn't see it, except indirectly. Would we be able to use this verified source list as a penalty box instead of debarring contractors now? Could we take a contractor that bought into a system and left us holding the bag and take him off the list and leave him off the list? Is there statutory allowability for that as the bill is now drafted?

Mr. COOPER. You are still addressing me, sir?

Mr. SPRATT. Yes, sir.

Mr. COOPER. I was hoping you were looking——

Mr. SPRATT. I will ask anyone who wants to answer that.

Mr. LETO. Could I make an observation?

I think you have that ability today. If I screw up on a contract within an agency, my reputation is irreparably harmed and it is very difficult for me under any circumstances to get back into that agency. So there are ways to make that happen and ways within the law to make that happen. My reputation means everything to me.

Mr. EBNER. Not only to make it happen, Mr. Spratt, but there is a requirement now in law I believe where past performance is supposed to be a factor to be considered in the award of any bid.

Mr. COOPER. I was going to comment on a more serious note that past performance is in fact a key evaluation factor in most modern procurements. So the Government has many ways to down-select, if you will, and I think the discussions that I expect that we will undertake will consider these types of factors.

I believe that there are many factors that exist today that will allow us to expeditiously get to a maximum practicable competition status that treats both the Government and industry in the fairest and most cost-effective way.

Mr. SPRATT. Mr. Chairman, I see the light is on. Thank you very much.

Mr. CLINGER. Thank you very much. Very thoughtful questions, Mr. Spratt.

Let me just follow up briefly on that. I think what we attempted to do in this legislation was to provide a lot of flexibility, basically to the contracting agencies. We were trying to say that the concept that we are trying to achieve here is maximum practicable competition addressing the problems that Mr. Leto talked about where if we cut them off halfway through the process, it is costly to everybody and not really very helpful to anybody.

So the objective here was to provide flexibility. We do give, in fact, a great deal of authority to the contracting agencies with the thought that there may be different considerations, depending on the procurement, it can't be just sort of uniform across the board; there are differing considerations depending on what the procurement is.

But what I am hearing you say is we need to be a little more specific. I think what we were saying is, we would be prepared to trust the contracting agencies to be reasonable in applying the concept you set forth here, rather than have Congress dictating or fine tuning, being very specific, because that is very difficult to do. And you know, I can see that this is going to take a lot more discussion as we go down the line.

I think what I am hearing is you all like the idea of circumscribing to those that are really going to be in the ball game, but you are not exactly sure that we have achieved that in this bill; is that fair to say? Do you think we have given too much authority to contracting agencies?

Mr. COOPER. I think the lack of definition, or I shouldn't say lack, perhaps the absence of what may be the optimum amount of definition when we are all done will lead to conflict, will lead to procurement disruption, et cetera. So I think the clearer we can make the process, and I mentioned the huge range of goods and services that the Government procures. So I don't think a single textbook approach for any given area can necessarily be drafted.

But I think that we can draw some more specific guidelines perhaps or process that both industry and the Government can understand, because we have said many times together that only if both parties understand the source selection criteria and the competitive nature of the procurement can this process work.

Mr. CLINGER. Thank you.

I am pleased to recognize the gentleman from Minnesota, Mr. Gutknecht for 5 minutes.

Mr. GUTKNECHT. Thank you, Mr. Chairman.

A real brief question. In the information we were given, and we have heard this before, that the Government is spending anywhere from 18 to 19, 20 percent, something like that, more than they would have to pay for some of these goods and services, is it the opinion of the members of this panel that if we pass this legislation we can recover all of that, most of it, more than that? How much can we really save if we pass this bill? Any ideas? Not all at once.

Mr. EBNER. Well, I think you would certainly have to see the final legislation. But the implementation of it would be critical, be-

cause a lot of these are particular administrative processes, and how they were adjusted or changed were determine how much you would save.

And you know, we can look at the Coopers & Lybrand study and talk about the 18 percent, and that is significant. Whether it would turn out to be 18 percent in actual fact is questionable. But the more you eliminate these nonvalue-added processes, the more you are going to save. It is difficult to predict a dollar amount, but clearly you are going in the right direction.

Mr. COOPER. I think I would comment, the reason I hesitated is I don't personally know the detail that led to the 18, 19 percent in the study, but what I would like to offer is that ITAA will study the specific underpinning assumption of the 18, 19 percent and we will give you our best judgment as to where costs would be taken out of that equation, if you will, with this statute.

Mr. LETO. I would be willing to make that same commitment on behalf of ARWG.

Mr. EBNER. Yes.

Mr. GUTKNECHT. Thank you, Mr. Chairman. I yield back.

Mr. CLINGER. I thank the gentleman.

I am pleased to yield to the gentleman from New Hampshire, Mr. Bass for 5 minutes.

Mr. BASS. Thank you very much, Mr. Chairman.

I would like to thank both the chairmen of the two committees of jurisdiction here for holding these important hearings on procurement reform, which is undoubtedly a long-standing but important issue which it is time we addressed.

As the distinguished chairman of the Government Reform and Oversight Committee knows, I am also a cosponsor of another procurement bill, primarily sponsored by Senator Roth and Congressman Kasich. You gentlemen may know the Roth-Kasich bill strives to reform procurement primarily or exclusively in the area of defense.

I have two questions here which I wish you would address if you could. As you know, the real purpose of H.R. 1368, which is the Roth-Kasich DOD Acquisition Management Reform Act of 1995, is to change the process by which the Defense Department buys weapons.

Under the current system, it is my understanding that it can take as much as 17 years to acquire a major weapon system; that is, from the time a need for a weapon is identified and until the time a weapon is put into the hands of our soldiers.

Does H.R. 1670 take any steps to change the process by which the Pentagon acquires weapons, and if so, how much?

Mr. COOPER. I would take a first cut at that, if I can. I think the provisions of this bill that emphasize reliance on the private sector not only in terms of technology, but practices, will yield significant benefits. I can't quantify that at the moment.

But, for example, two of the members of the panel, and perhaps the third, but Mr. Leto's company is fielding a system for the Navy that converts paper documents in the digital form and makes it available for access to a worldwide basis. My own company is developing the system that actually provides that worldwide connectivity. The benefits that we expect from that in terms of not

only fielding the system, designing the system, fielding the system and maintaining the system, we think will take substantial time out of that process and substantial cost.

So this bill's emphasis—and by the way, many of those products and many of those processes derived from technologies and practices in the private sector to a large degree. So I think this bill emphasizes the continued emphasis in that area, and will in fact result in a cost savings from this approach.

Mr. BASS. Any other comment?

Mr. LETO. I can't specifically address weapons, because I am not in that business.

Mr. BASS. I understand.

Mr. Cooper, you may have touched on a connection between general procurement and defense procurement reform. Would it appear that these two pieces of legislation have similar intentions, and that is to ensure that we procure items more quickly and cheaply than we do now, as you alluded to?

Mr. COOPER. Yes.

Mr. BASS. However, unlike H.R. 1670, H.R. 1368 is specifically targeted at reforming the defense procurement process. In your opinion, do you think it would be wise to debate the merits of both of these bills and combine them if the committees agree that each contain provisions that could obtain or achieve real reform?

Mr. COOPER. I would say that if there are mutual benefits between the two bills, that it would seem to us productive from an industry perspective. We would certainly take the challenge, if you will, to advise you on what common areas of the bill we see could be beneficial or productive.

I can't really speak from the Government's side as to whether that interchange, if you will, is productive at this point. But clearly, industry would be prepared to assess both bills and respond in terms of commonality or purpose.

Mr. BASS. OK. Any other comments?

Mr. EBNER. Well, Mr. Bass, as a representative of a defense contractor, I would certainly agree with what Mr. Cooper says. We are quite interested in acquisition reform, and Lord knows there is lots of room for reform.

I haven't personally looked at the provisions of the bill you have sponsored. We can certainly do that. But I think, to the degree that they are compatible, we would certainly support an end product that achieved the objectives that you are both seeking to achieve, and we would be willing to work with you, of course, on specific provisions.

Mr. BASS. Very well.

Thank you very much, Mr. Chairman. I yield back.

Mr. CLINGER. Thank you, Mr. Bass.

May I thank all of our panelists for your assistance and very excellent suggestions, and we do look forward to staying in close touch with you as we proceed along and move toward enacting this I think very vitally needed legislation. So we thank you all for your participation this morning.

Mr. EBNER. Thank you, Mr. Chairman.

Mr. COOPER. Thank you.

Mr. CLINGER. I would announce that we will not break for lunch in view of the fact that we do have several panels to go, and I am hopeful that some of my colleagues will return, although with no votes, they may be flying away to their districts. So we will continue to go through and everybody can take a break and go for lunch as you can fit it in.

But at the moment I would ask our second panelists to come forward, and they are Mr. Edward Black, president of the Computer and Communications Information Association, Mr. Dan Young, president of the Federal Data Corporation, and Mr. Sterling Phillips, the executive vice president and chief operating officer of Tri-Cor Industries, Incorporated.

Gentlemen, as you heard, it is our practice in this committee to swear all witnesses, so as to not prejudice any witness, if you have no objection.

[Witnesses sworn.]

Mr. CLINGER. Thank you, gentlemen, for your participation here today. I would ask Mr. Black to lead off, if you would.

STATEMENT OF EDWARD BLACK, PRESIDENT, COMPUTER AND COMMUNICATIONS INFORMATION ASSOCIATION

Mr. BLACK. Mr. Chairman, thank you. It is a pleasure to be here today.

I am pleased to testify on behalf of the Computer and Communications Industry Association, CCIA, and our member companies, on H.R. 1670, the Federal Acquisition Reform Act of 1995.

CCIA is an association of some 25 member companies which represent all facets of the computer and communications industry. Collectively, our members generate annual revenues of nearly $190 billion and have substantial involvement in the Federal marketplace.

We have long supported procurement reforms passed by both committees, including the Federal Acquisition Streamlining Act of 1994, FASA–1. We share the committee's goals of ensuring a competitive and cost-effective Federal procurement system with an effective enforcement mechanism and we value the good working relationship we have had together for 23 years.

During this period, CCIA has consistently advocated the benefits of open markets, open systems, and full and open competition. We thank you for continuing to improve legislation relating to commercial products. We look forward to the time when the elimination of the remaining exceptions will allow the end of cost and pricing data collection. The savings to Government will then be even greater.

As we testified in February, we feel very strongly that congressional oversight and evaluation of the effectiveness of FASA–1 is very important, and should precede major new acquisition reform initiatives. Nonetheless, we welcome the opportunity to comment today on H.R. 1670.

In our estimation, enactment of the bill would have two principal results. It would greatly improve the bid protest mechanism by consolidating the 11 Board of Contract Appeals into one board, along with the GAO's bid protest authority; but at the same time, it takes away the very tool that the board needs to function properly: a meaningful and well-defined standard of competition.

We believe the bid protest system is an essential component of Federal procurement law. The bid protest system represents a wise policy decision to use private sector companies as enforcers of Federal procurement law.

In addition, an entire body of case law has been developed on the interpretation of what is full and open competition. Changing the competitive requirements to maximum practicable from full and open will invite legal suit after legal suit as to what the new standard means.

The requirement of full and open competition in the Federal market goes hand in hand with the need for an impartial forum to ensure that there is fairness in the process. It is difficult to have either—and to be effective and beneficial to the Government—without the other.

The Government needs all the competition it can get. Competition decreases costs, ensures that the taxpayers get the most bang for their buck. Not only has full, free and open competition fostered cost savings to the Government, it has also helped small and small disadvantaged businesses to become a full-fledged part of the American mainstream.

One important fact, the consequences of which may not be fully understood, is that many sectors of our industry are converging. Other legislation in this Congress designed to update our Nation's telecommunications laws will accelerate this process by removing legal and bureaucratic obstacles to competition. But whether that legislation passes or not, many substantial companies are going to be doing business in areas that outside observers might not now anticipate.

The Federal Government should be able to save tax dollars as a result of this convergence and increased competition. Now is not the time to put up barriers to keep that increased competition from coming into play. We do not think Congress should risk allowing bureaucratic processes to easily narrow the field of competitors, especially not when new market entrants are growing in dynamic and unpredictable ways. If not unreasonably constrained, market forces can yield substantial budget and taxpayer savings.

The market, not bureaucrats, should decide who should compete. Government should not shortchange itself and deny itself access to the best products at the lowest prices solely because it is easier to maintain the status quo than to take advantage of a competitive market.

Lack of competition and the promotion of favoritism in Federal procurement distorts the American economy by giving an economic advantage to certain companies the Government likes.

One further comment, if I could, with regard to the definition of "maximum practicable" that I heard up here earlier today. The current CICA law has a mechanism and several standards by which those who are viewed as truly unreasonable applicants, who do not have the prior qualifications, can be screened. That is what we have; what we have heard is a reason for the change away from full and open. But the current law provides for that now.

The difference is, it doesn't stop people from coming in and saying, I want to bid, I want to compete. Once they come in, then they can be looked over and see how they hold up. But we do not think

you should shut out, at the intake valve stage, in essence, the range of possible competitors. Especially at a time when our industry is going to provide a lot more competitors, we are going to have a lot more people able and willing and anxious to compete, and they should not be screened out because they are somewhat new on the horizon or some bureaucrat arbitrarily makes that decision.

Thank you very much, Mr. Chairman, for the opportunity to testify. I do have an attachment and I would appreciate if I could have submitted for the record as well.

[The prepared statement of Mr. Black follows:]

PREPARED STATEMENT OF EDWARD BLACK, PRESIDENT, COMPUTER AND COMMUNICATIONS INFORMATION ASSOCIATION

Mr. Chairma(e)n, Members of the Committee(s) I am pleased to testify today on behalf of The Computer & Communications Industry Association (CCIA) and our member companies on H.R. 1670, the "Federal Acquisition Reform Act of 1995." CCIA is an association of some 25 member companies which represent all facets of the computer and communications industry. Collectively, our members generate annual revenues of nearly $190 billion and have substantial involvement in the Federal marketplace. We have long supported procurement reforms passed by both Committees, including the Federal Acquisition Streamlining Act of 1994 (FASA I).

We share the Committees' goals of ensuring a competitive and cost-effective Federal procurement system with an effective enforcement mechanism, and value the good working relationship we have had together for 23 years. During this period CCIA has consistently advocated the benefits of "Open Markets, Open Systems, and Full & Open Competition."

We thank you for continuing to improve legislation relating to commercial products. We look forward to the time when the elimination of the remaining exceptions will allow the end of cost and pricing data collection. The savings to government will then be even greater.

As we testified in February, we feel very strongly that Congressional oversight and evaluation of the effectiveness of FASA I is very important and should precede major new acquisition reform initiatives.

Nonetheless, we welcome the opportunity to comment on H.R. 1670. In our estimation, enactment of the bill would have two principal results: it would greatly improve the bid protest mechanism by consolidating the 11 Board of Contract Appeals into one Board alcng with GAO's bid protest authority; but at the same time it takes away the very tool the Board needs to function properly—a meaningful and well-defined standard of competition.

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In addition, an entire body of case law has been developed on the interpretation of what is full and open competition. Changing the competitive requirements to "maximum practicable" from "full and open" will invite legal suit after legal suit as to what the new standard means.

The requirement of full and open competition in the Federal market goes hand in hand with the need for an impartial forum to ensure that there is fairness in the process. It is difficult to have either be effective or beneficial to the Government without the other.

The Government needs all the competition it can get. Competition decreases costs and ensures that taxpayers get the most bang for their buck.

Not only has "full, free, and open competition" fostered cost savings to the Government, it has also helped small, and small disadvantaged, businesses to become a full fledged part of the American mainstream.

One important fact, the consequences of which may not be fully understood, is that the many sectors of our industry are converging. Other legislation in this Congress designed to update our nation's telecommunications laws will accelerate this process by removing legal and bureaucratic obstacles to competition. But whether there is legislation or not, many substantial companies are going to be doing business in areas that outside observers might not anticipate. The federal government should be able to save tax dollars as a result of this convergence and increased competition.

We do not think Congress should risk allowing bureaucratic processes to easily narrow the field of competitors, especially not when new market entrants are grow-

ing in dynamic and unpredictable ways. If not unreasonably constrained, market forces can yield substantial budget and taxpayer savings. The market, not bureaucrats should decide who should compete.

Government should not shortchange itself and deny itself access to the best products at the lowest prices solely because it is easier to maintain the status quo than take advantage of a competitive market. Lack of competition and the promotion of "favoritism" in Federal procurement distorts the American economy by giving an economic advantage to certain companies the Government likes.

PREPARED STATEMENT OF THE COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION

INTRODUCTION

The Computer & Communications Industry Association (CCIA) is pleased to have the opportunity to testify regarding H.R. 1670, the "Federal Acquisition Reform Act of 1995." CCIA is an association of some 25 member companies which represent all facets of the computer and communications industry. Collectively, our members generate annual revenues of nearly $190 billion and have substantial involvement in the Federal marketplace. Since 1972 we have supported the important procurement reforms passed by both these Committees, including the Federal Acquisition Streamlining Act of 1994 (FASA I).

We support the same goals as the Committees, such as a competitive and cost-effective Federal procurement system with an effective enforcement mechanism. We have enjoyed working with you over the years and look forward to continuing this long-standing relationship. As we said when we testified before you in February, we feel very strongly that any new acquisition reform should occur only after close Congressional oversight and evaluation of the effectiveness of FASA I.

Nonetheless, we welcome the opportunity to comment on H.R. 1670. In our estimation, enactment of the bill would have two principal results: it would greatly improve the bid protest mechanism by consolidating the 11 Board of Contract Appeals into one Board along with GAO's bid protest authority but at the same time it takes away the very tool the Board needs to function properly—a meaningful and well-defined standard of competition.

NEED FOR FULL AND OPEN COMPETITION

In attempting to "fix" deficiencies in the Federal procurement system, we are concerned that H.R. 1670 apparently has the unintended effect of "unfixing" those parts of the system which are working and working well. It is imperative, in these times of fiscal responsibility regarding taxpayer dollars, that the Government obtains quality goods and services in an efficient, effective, and economical manner. CCIA believes that this can only be accomplished through full and open competition in the Federal marketplace.

What Competition Is and Is Not

CCIA's primary concern with H.R. 1670 is that it removes the concept of full and open competition from the Federal procurement arena. This decision appears to have been based on a different perception as to what full and open competition is and is not.

First, in order to fully appreciate why full and open competition is crucial to Federal procurement, we need to understand why Congress found it necessary to enact such requirements in the first place. The requirement of full and open competition was a bipartisan effort on behalf of Congress in 1984 to "ensure that new and innovative products are made available to the Government on a timely basis and that all interested offerors have an opportunity to sell to the Federal Government." H. Rep. No. 1157, 98th Cong., 2d Sess. 11 (1984). The Competition in Contracting Act (CICA), which requires full and open competition, was passed by a Democratic House, under the sponsorship of Congressmen Jack Brooks and Frank Horton and by a Republican Senate, under the sponsorship of Senators William Roth, Carl Levin and William Cohen. The legislation was signed into law by then President Ronald Reagan.

While some say that the choice between maximum practicable and full and open competition is simply a word exercise, H.R. 1670 goes beyond a definitional change by removing the safeguards from CICA that requires procurements to be competitively awarded. H.R. 1670 completely eliminates the Competition in Contracting Act's requirements for justifications and authorizations prior to using other than competitive procedures. These requirements, coupled with a strong bid protest sys-

tem are the primary reason for the increase in competition produced by CICA. Without a meaningful justification and authorization process, there is no brake within the agencies to prevent noncompetitive procurements from occurring.

Prior to the enactment of CICA, agencies were required to compete negotiated contracts to the maximum extent practicable. One of the Act's sponsors' observed that while there was a strict textual definition of the level of competition required, agencies were able to discover large loopholes for avoiding competition. "The justification most frequently invoked [wa]s the 'competition is impracticable' exception, which agencies sometimes improperly use to award sole-source contracts." Hon. William S. Cohen, The Competition in Contracting Act, 14 Pub. Cont. L. J. 1, 15 (1983). In addition, Congress found that agencies were issuing overly-detailed specifications that unnecessarily restricted the procuring agency from considering acceptable alternatives. Many times the detailed specifications resulted in only one contractor being able to meet the agency's needs.

The former House Committee on Government Operations determined that

> [l]left unchallenged, [lack of competition] will subject the [Federal procurement] process to untold waste and abuse, and eventually harm the viability of critical agency programs. Rather than address these problems, agency procurement officials continue to complain that seeking full and open competition is too complicated and time consuming. They assert that it is less risky and considerably more manageable to do business with a few selected vendors instead of encouraging all qualified companies to enter the Federal marketplace.

H. Rep. No. 1157, 98th Cong., 2d Sess. 11 (1984).

The Committee determined that the reason for this lack of competition was that laws and regulations did not adequately require that competitive procedures be used:

> The FAR state[d] that sufficient competition is achieved as long as offers are received from at least two independent sources that are capable of satisfying the requirements of the agencies. Thus, the standard for competition is not whether an agency has opened up a procurement to all qualified sources, but whether it received at least two bids. In the Committee's view, an acquisition is hardly competitive when it is limited to just two independent sources, since additional bidders are often available to meet a Government requirement. Using the traditional view, an agency may select two of its favorite vendors and then assert that a 'reasonable degree of competition' had been achieved. The Committee believes that full and open competition exists only when all qualified vendors are allowed to compete in an agency acquisition.

H. Rep. No. 1157, 98th Cong. 2d Sess. 16 (1984).

As one author of CICA put it "[c]ompetition maintains integrity in the expenditure of public funds by ensuring that Government contracts are awarded on the basis of merit rather than that of favoritism." Hon. William S. Cohen, The Competition in Contracting Act, 14 Pub. Cont. L. J. 1, 5 (1983).

Second, contrary to current belief, CICA does limit the field of vendors who are eligible to compete for Government contracts. The Senate Committee on Governmental Affairs, in enacting CICA, was careful to point out that it "strongly believe[d] that all contractors should have the opportunity to compete for a Government contract, while only those capable of meeting the Government's needs should be considered for award." Hon. William S. Cohen, The Competition in Contracting Act, 14 Pub. Cont. L. J. 1, 33 (1983).

CICA limits competitors to those who submit proposals in the competitive range. Under the FAR contracting officers may only award the contract to a competitor who is both responsive and responsible. Thus, there is ample authority under CICA for the contracting officer to impose limitations that allow the Government to reject proposals of vendors who do not meet the Government's needs.

Third, the Committee's background paper on H.R. 1670 stated that "the procurement system can no longer afford competition for competition's sake, but must move to the process of meaningful competition between vendors who can meet or exceed the Government's needs." On the contrary, in today's fiscal climate, the Government needs all the competition it can get. Competition decreases costs and ensures that taxpayers get the most bang for their buck. A decrease in competition will result in an increase in cost to the Government. Studies have indicated that an increase in competition can save between 15 and 50%. Hon. William S. Cohen, The Competition in Contracting Act, 14 Pub. Cont. L. J. 1, 4 (1983).

In fact, the last procurement reform group to study the Federal acquisition system, the Acquisition Law Advisory Panel (Section 800 Panel) "concluded after extensive discussion that retreat from the 'full and open competition' standard was neither warranted or wise." Acquisition Law Advisory Panel, Streamlining Defense Acquisition Laws, 1–24 January 1993). In making this determination, the Section 800

Panel was mindful of Congress' concern that exclusion of one qualified vendor can prevent the Government from having received its money's worth. See Id.

Fourth, H.R. 1670's statutory definition of competition is ambiguous regarding the restrictions as to when a particular source(s) can be excluded and when other than competitive procedures can be used. By leaving this language unclear, Congress is abdicating its authority to the Executive Branch to determine the level of competition of Federal procurement. Historically, the Executive Branch has attempted to restrict competition as much as possible; that is why we ended up with the Competition in Contracting Act in 1984.

Fifth, this bill would restrict the ability of the market to deliver the best possible products at the lowest price by limiting competition for Federal contracts. The economy fluctuates and the same companies cannot be counted on, year after year, to meet the Government's needs in the most efficient and cost effective manner. There are entrepreneurs right now developing innovative new products and services who could well be foreclosed by this legislation from competing in the Federal market. If this were to occur, the real losers would be the taxpayers.

A business participating in the commercial marketplace that does not continue to keep up with the latest technology will be left in the dust. Consumers will be concerned with future suitability and the then current usefulness of products and services not with how good they might have been in the past. The Federal Government should not shortchange itself and not receive the best products at the lowest prices solely because it is easier to maintain the status quo than take advantage of a competitive market. Lack of competition and the promotion of "favoritism" in Federal procurement distorts the American economy by giving an economic advantage to certain companies the Government likes and inhibits the growth of other firms for other than meritorious reasons. The taxpayers deserve more for their money than having a few large corporations supply the Government with average products or services at average prices just because it is too much trouble to let the competitive market work.

The procurement system depends on Government employees to do what is right, not that which is easy. Doing what is right may take longer than picking an easy favorite time after time. We believe the procurement system itself needs to be structured to encourage correct conduct. It is imperative that fully competitive market forces are allowed to flourish.

Requiring only maximum practicable competition will take the country back to where it was 11 years ago, not ahead to the next century.

H.R. 1760's Effect on Government Savings

The lack of competition in DoD contracting was a concern of Congress when it enacted CICA and it is still a concern today. This legislation was partially inspired by DoD and other procurement cost problems: DoD pays between 18 and 19 percent more for their goods and services due to regulatory implementation and operational burdens. However, these premiums are largely due to accounting, recordkeeping and other burdens that DoD imposes on contractors—burdens that have nothing to do with the level of competition in DoD procurements. Competition has saved the Government hundreds of billions of dollars. These savings have taken place not just in the relatively "unburdened" civil market, but also in DoD—where the bill substitutes "maximum practical competition," for "full, free, and open competition," thereby denying Government the benefits of wide-spread competitive discounting. Not only has "full, free, and open competition" fostered cost savings to the Government, it has also helped small, and small disadvantaged, businesses to become a full fledged part of the American main stream. "Maximum practicable competition" provides little or no similar comfort to the entrepreneur.

CCIA is concerned that the test program provisions in H.R. 1670 will inadvertently prevent certain qualified companies from participating in Federal procurements. In FASA I, the ability of Executive agencies to conduct test programs was tied to the implementation of a full FACNET capability. H.R. 1670, however, removes this requirement. Since some test programs may involve the omission of a Commerce Business Daily notice, small and small disadvantaged businesses will not know where there is available Government business for which to compete. In addition, coupling the test program with full FACNET implementation is a powerful incentive to complete FACNET promptly. There is a strong need for a uniform system of electronic commerce. Currently, some vendors must search over 50 electronic bulletin boards to keep up with the Government's procurements. FACNET should end the need to navigate through an electronic maze. We should not delay full FACNET implementation.

NEED FOR EFFECTIVE ENFORCEMENT OF FULL AND OPEN COMPETITION

As we testified earlier this year, CCIA has been deeply concerned by proposals to eliminate or weaken the GSBCA bid protest authority, which was established under the 1984 Competition in Contracting Act (CICA). We are pleased that legislation maintains a strong bid protest forum which is crucial to a competitive Federal procurement market.

In these fiscally difficult times, the merging of the Boards of Contract Appeals and consolidating the bid protest authority of the GSBCA and GAO into one forum helps to further the Government's goal of downsizing while efficiently and cost effectively conducting its business. We believe that requiring the current Chairman of the GSBCA to serve as the Chairman of the consolidated Board during the first two-year period will be beneficial for a smooth and efficient transition. Only the GSBCA has experience in deciding bid protest cases as well as contract disputes and the consolidated Board will be well served by such experience.

While we are delighted that there will be an adequate Federal protest forum, we are deeply concerned that the removal of the full and open competition requirement will greatly diminish the ability for competitors to seek redress for unfairly conducted Government business. The key to the Board's successful infusion of competition into the procurement process is its ability to enforce the proper application of laws and regulations requiring competition. If those laws and regulations are not adequate in requiring competition, then the protest system is rendered basically meaningless.

In addition, an entire body of case law has been developed on the interpretation of what is full and open competition. Changing the competitive requirements to "maximum practicable" from "full and open" will invite legal suit after legal suit as to what the new standard means. Full and open competition is understood by competitors, the Government, and the legal forums. The United States Board of Contract Appeals (USBCA) will spend most of its time interpreting this new standard, not preserving competition in the Federal marketplace.

The current GSBCA protest forum is a continuous monitor of the Government's devotion to keeping the system fair, open and competitive. The bid protest system represents a policy decision to use private-sector companies as enforcers of federal procurement law. Through the protest forum, the Government essentially lets the market oversee the system. Companies who do business with the Government are authorized to file protests with impartial administrative bodies whenever they believe that agencies are designing procurements unfairly or awarding contracts improperly. It anticipated that citizen oversight would preserve the benefits of a competitive Government marketplace and it has.

This system has a number of benefits. First, unlike Government auditors, private vendors are almost always "on the scene" when a violation occurs. Second, the protest process provides a mechanism for oversight without establishing cumbersome enforcement bureaucracies. However, the private sector will not assume this enforcement role without some assurance that it will achieve meaningful results in meritorious protests. The suspension process assures that agencies will not be able to spend money under illegal contracts, and then use the cost of termination as a reason to continue contracts that should never have been awarded.

Having this forum available to competitors for Federal business, means that the Government will receive the benefits of a highly competitive market. Companies are more likely to compete for sales in an environment in which they receive equitable treatment. The entry of more competitors into the market prompts each vendor to be more innovative and to offer better prices and quality in an effort to convince agencies that they should award that firm contracts. The requirement of full and open competition in the Federal market along with an impartial forum to ensure that there is fairness in the process go hand in hand. It is difficult to have one be effective and beneficial to the Government without the other.

CONCLUSION

The legacy of earlier procurement reforms, enacted on a bipartisan basis over the past decade, could be severely crippled by H.R. 1670. Again, CCIA strongly recommends that any new reform measures should only be enacted after careful evaluation and review of FASA I initiatives. Otherwise, we run the risk of a throwback to earlier eras in Government procurement that were marked by scandal, a lack of basic accountability, and public outcry. In this era of constricted budgets and limited taxpayer dollars, it is crucial that the Federal procurement system is run fairly, efficient, and most important, cost effectively. This can occur most effectively if the Federal market maintains full and open competition.

[From the Public Contract Law Journal—October 1983]

THE COMPETITION IN CONTRACTING ACT

(By Hon. William S. Cohen, U.S. Senator, R–Maine)

I. INTRODUCTION

The federal government spent more than half of its discretionary budget last fiscal year on the direct purchase of property and services from the private sector. While the dollar value of government contracts has almost tripled during the past decade—from $57.5 billion in fiscal 1972 to $158.9 billion in fiscal 1982[1]—and the nature of the procurement in many cases has become infinitely more complex, the laws which have governed military and civilian contracting over the past thirty years remain intact.

Two statutes provide the foundation for federal contracting. The Armed Services Procurement Act of 1947 applies to the Department of Defense (DoD), the National Aeronautics and Space Administration (NASA), and the Coast Guard. 10 U.S.C. § 2301 et seq. The Federal Property and Administrative Services Act of 1949 directs the purchasing activities of civil agencies. 41 U.S.C. § 252 et seq. Both statutes require government agencies to promote the use of full and free competition in the procurement of property and services. 10 U.S.C. § 2305(a); 41 U.S.C. § 253(a).[2] In government contracting, competition is a marketplace condition which results when several contractors, acting independently of each other and of the government, submit bids or proposals in an attempt to secure the government's business.[3]

It is important to understand, therefore, that competition is not a procurement procedure, but an objective which a procedure is designed to attain. The two basic procurement procedures are formal advertising and negotiation. Present law requires that government agencies formally advertise—specify their needs, solicit sealed bids to meet those needs, and award the contract without discussions to the lowest responsive and responsible bidder—whenever feasible and practicable. 10 U.S.C. § 2305; 41 U.S.C. § 253. Formally advertised contracts are awarded on a price-competitive basis. This procedure is aimed at securing the most advantageous contract for the government and lessening the opportunity for favoritism.

As long as the government is purchasing property or services where gradations in quality do not preclude selection on the basis of bid price, formal advertising works well and is most appropriate. For more complex procurements, however, contracts cannot reasonably be awarded solely on the basis of price without discussions with the offerors. In these circumstances, negotiation affords the best opportunity to obtain competition.

The Armed Services Procurement Act (ASPA) and the Federal Property and Administrative Services Act (FPASA) authorize negotiated procurement, but restrict its use to certain conditions. The ASPA and the FPASA provide seventeen and fifteen exceptions to formal advertising, respectively, under which an agency may negotiate. 10 U.S.C. § 2304(a); 41 U.S.C. § 252(c). To control their use, many of the exceptions require a written justification (determinations and findings statement), and some also require approval by the agency head. 10 U.S.C. § 2310(b); 41 U.S.C. § 257(c).[4] While agencies are required to award negotiated contracts competitively to the maximum extent practical (10 U.S.C. § 2304(g); FPR 1–1.301–1),[5] negotiation

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[1] Figures were obtained from the "Report of the Commission on Government Procurement" (Volume 1, December 1972, p. 1) and the Federal Procurement Data Center (Special Analysis 8, fiscal 1982).

[2] In addition, the Office of Federal Procurement Policy Act states that it is "the policy of the Congress to promote economy, efficiency, and effectiveness in the procurement of property and services by and for the federal executive branch by promoting the use of full and open competition." 41 U.S.C. § 401.

[3] Commission on Government Procurement, Report of the Commission on Government Procurement, Volume 1, December 1972, p. 19.

[4] The ASPA requires a written finding by the person making a determination or decision to negotiate under exceptions (2), (7), (8), (10), and (11)–(16). 10 U.S.C. § 2310(b). The FPASA imposes the same requirements for civilian agencies using exceptions (2), (7), (8), and (10)–(14). 41 U.S.C. § 257(c). The delegation of authority below the head of the agency to make a determination and finding is restricted under specified exceptions.

[5] The ASPA requires that for "all negotiated procurements in excess of $10.000 . . . proposals shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured." 10 U.S.C. § 2304(g). While there is no similar provision in the FPASA. the Federal Procurement Regulations state that "all purchases and contracts, whether by formal advertising or by negotiation. shall be made on a competitive basis to the maximum practicable extent." EPR 1–1.301–1.

can be—and frequently is—noncompetitive. Beyond the justification for negotiated procurement, however, present law does not require further justification for noncompetitive (sole-source) award.[6]

Unlike the rigid sealed bid procedures for formal advertising, negotiation allows for considerable flexibility. In a negotiated procurement, contracting officers are permitted to discuss the terms and conditions of the contract with all contractors in a competitive range. 10 U.S.C. §2304(g): FPR 1–3.804 and 1–3.805–1.[7] Consistent with the flexible nature of negotiation, the evaluation and award procedures for negotiated contracts allow for more discretion. Contracting officers are not required to award to the low offeror, as in formal advertising, but may "trade off" cost to the government against factors such as technical performance or management capability in selecting the source.[8]

Competitive procurement, whether formally advertised or negotiated, is beneficial to the government. First, competition in contracting saves money. Studies have indicated that between 15 and 50 percent can be saved through increased competition.[9] In 1977, the Defense Science Board (DSB) examined more than a dozen examples of competed contracts for weapons such as the AIM–7 missile and found significant evidence of cost savings, with an average saving of nearly 15 percent. The DSB concluded that "competition is a powerful motivator for cost control."[10]

More recently, the General Accounting Office reported, at Senator Carl Levin's request, the results of the competitive procurement for the T–3 tractor—a contract which initially was to have been awarded noncompetitively. The GAO found that the lowest bid in a competitive procurement for the T–3 tractor was 43 percent less than the price of the contract had it been awarded on a sole-source basis.[11] The savings due to competition, however, are unique to each particular program.

In addition to potential cost savings, competition also curbs cost growth.[12] According to an October 1979 Rand Corporation analysis, entitled Acquisition Policy Effectiveness: Department of Defense Experience in the 1970s, competitive procurement has led to improvements in system performance and on-schedule delivery by contractors, which have subsequently lowered real cost growth by as much as one-

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[6] It is the responsibility of the contracting officer to make every possible effort to obtain competition in negotiated contracts. When a proposed procurement appears to be necessary noncompetitive, the regulations require contracting officers to ensure that competitive procurement is not feasible and to avoid the need for subsequent noncompetitive procurements. Moreover, the regulations state that contracts in excess of $10,000 shall not be negotiated on a noncompetitive basis without prior review at a level higher than the contracting officer. DAR 3–101(d); FPR 1–3.101(d).

[7] The ASPA and the FPASA, as originally enacted, provided no guidance on negotiation procedures. The ASPA was amended in 1962 to establish guidelines for conducting competitive negotiations. 10 U.S.C. §2304(g). While the FPASA was never amended to provide these guidelines, the FPR adopted similar provisions for civilian agencies. FPR 1–3.101, 1–3.804, and 1–3.805–1.

[8] The Commission on Government Procurement stated in its report that the "single element which most acutely distinguishes negotiation techniques from formal advertising is the subjective judgment which weighs quality and other factors against price. . . . Formal advertising, in effect, resolves all 'tradeoffs' by specifying a common product before offers are solicited. Negotiation, on the other hand, uses a more general specification which asks the seller to recommend the combination of those aspects of the solicitation he thinks will represent the best deal to the government." Supra note 3.

[9] The following is a list of studies on competition in contracting, along with the year each study was completed, the number of systems they reviewed, and the average savings found due to the increased use of competition: Institute for Defense Analysis (IDA), 1979, thirty-one systems, 31 percent; Army Procurement Research Office, 1978, eleven systems, 12 percent; IDA, 1974, twenty systems. 37 percent; Logistics Management Institute (LMI), 1974, one system, 22 percent; LMI, 1973, NA, 15–20 percent; Joint Economic Committee, 1973, twenty systems, 52 percent; ECOM, 1972, seventeen systems, 50 percent; RAND, 1968, NA, 25 percent; McNamara, 1965, NA, 25 percent.

[10] Report of the Defense Sciences Board on "Reducing the Unit Cost of Equipment," 1979 Summer Study, March 1980, p. 104.

[11] Statement of Senator Carl Levin, Cong. Rec., 97th Congress, 2nd Session, December 21, 1982, p. S16029.

[12] The term "cost growth" refers to the increase of the unit cost of a program during the course of the acquisition process. Cost growth is measured by comparing actual costs to a baseline cost estimate. Norman Augustine, Chairman of the Defense Science Board, stated in a February 1982 Government Executive article that the chance of a major program being completed within its initial cost estimate is about 9 percent and that the average cost growth for major programs is 52 percent.

third.[13] The Analytic Sciences Corporation (TASC) completed a study in April 1982, entitled Sustained Competition for Defense Procurements: Evidence, Theory, and Applications, which compared cost growth between competitive and noncompetitive programs. The TASC study found that cost growth in programs during full-scale development varied from 2.0 percent for competitive programs to 40.2 percent for noncompetitive programs, while cost growth during production ranged from 9.65 to 12.7 percent.[14]

Competition may also promote significant innovative and technical changes. In some cases, competition serves as an incentive for firms to be more progressive in developing cost-reducing design changes and improvements in manufacturing technology in order to gain advantage over their competitors. Increased product quality and reliability are potential benefits of competition, especially when performance and quality are included in the solicitation as production award criteria. A long-term benefit of competition, moreover, is enhanced mobilization capability and industry responsiveness.

The last, and possibly the most important, benefit of competition is its inherent appeal of "fair play." Competition maintains integrity in the expenditure of public funds by ensuring that government contracts are awarded on the basis of merit rather than that of favoritism.

Despite the significant benefits of competition in contracting, the committee has found that most federal contracts—by dollar value—are awarded without competition. In fiscal 1982, more than half of the value of all federal contracts was awarded noncompetitively. Even more disturbing is the fact that competitive contracting has declined in recent years and continues to decline this year, according to the General Accounting Office (GAO) and data compiled by the Federal Procurement Data Center (FPDC).[15]

II. HISTORY

Federal procurement policy dates back to the Second Continental Congress in 1792.[16] By 1809, Congress established the requirement for competition in contracting, with formal advertising as the preferred method. The law stated that "all purchases and contracts for supplies or services . . . shall be made either by open purchases, or by previously advertising for proposals." 2 Stat. 536(1809). The Attorney General has interpreted congressional intent as "preventing favoritism . . . and the notorious mischief of making contracts privately."[17]

Formal advertising procedures were developed in the ensuing years as experience under the statute demonstrated the need for additional formalities. In 1861, Congress enacted a law to reaffirm the requirement for formal advertising. 12 Stat. 220(1861). Numerous Comptroller of the Treasury, Comptroller General, and court decisions implemented the statute by further defining the procedures to be followed.

The most significant developments in procurement policy have been generated by war. Prior to World War I, formal advertising procedures were similar to those practiced today: specifications for a needed item were published, bids were solicited, and the contracts were awarded to the lowest bidder. Exceptions to these procedures were granted for "public exigencies" and "personal services," and when "it was impracticable to secure competition."

During World War I, however, formal advertising procedures were too inflexible to mobilize government resources. The War Industries Board, established to control wartime resources, relaxed the requirement for formal advertising and authorized procurement by negotiation. The need for full utilization of the nation's industrial strength was the fundamental reason for this shift to negotiation.

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[13] The Rand Corporation report, which was prepared for the Under Secretary of Defense for Research and Engineering, concludes that the advantage of competitive contracting, in addition to curbing cost growth, is better contractor design.

[14] The Analytic Sciences Corporation, "Sustained Competition for Defense Procurements: Evidence, Theory and Applications," April 27, 1982, p. 4–3.

[15] Prepared statement of Robert M. Gilroy, Senior Associate Director of the Procurement, Logistics and Readiness Division, U.S. General Accounting Office, before the Senate Governmental Affairs Committee, 97th Congress, Competition in the Federal Procurement Process. June 29, 1982, Hearing Record, pp. 63–77. The GAO analyzed DoD procurements over the last ten years and found that competitive procurements reached a high of 43.6 percent of all DoD procurement dollars in fiscal 1974 and declined to a low of 32.9 percent in fiscal 1980. The increase to 36.6 percent in fiscal 1981, according to Mr. Gilroy's testimony, was due to a change in the petroleum situation. For civilian procurements, data on competition were only available for fiscal years 1979 to 1981, which show that competition declined from 52 percent to 46 percent.

[16] Report of the Commission on Government Procurement. Appendix G, provides an excellent background on the historical development of the procurement process. Supra note at 164–84.

[17] Op. Att'y Gen. 257(1829) and 6 Op. Att'y Gen. 99(1953).

Wartime profiteering was curtailed when government procurement returned to formal advertising on a fixed-price basis after the war. To alleviate any further complications, the War Policies Commission recommended in 1930 that formally advertised procurement be replaced by negotiated procurement during war. Rather than allow this wholesale shift, however, Congress provided more exceptions to the formal advertising requirement.

During World War II, the statutory requirement for formal advertising was again relaxed. In December 1941, Congress passed the First War Powers Act, which authorized the president to give the departments involved in the war the power to make contracts "without regard to the provision of law relating to the making, performance, amendment, or modifications of contracts." 55 Stat. 838(1941). The War Production Board, given control over war-time production and procurement under Executive Order 9024, went so far as to prohibit the use of formal advertising without specific authorization. Within this broad negotiating authority, competition was actively sought and wartime expertise demonstrated the wisdom of more flexible procedures.

As the end of the war approached, the Policy Procurement Board, a part of the War Production Board, was in charge of the preparatory work for formulating peacetime procurement regulations. In 1945, a task force of the Policy Procurement Board, consisting of officers from the federal procuring agencies, submitted recommendations for post-war procurement policy which were to establish the foundation for the Armed Services Procurement Act. The thrust of the board's recommendations was that flexibility in procurement was necessary to support the growth and sustainability of an industrial power base. The board was critical of the pre-war requirement for formal advertising and cited examples of its inadequacy. These examples were incorporated into the ASPA as the basis for the seventeen exceptions to formal advertising. 10 U.S.C. § 2304(a).

Congress recognized the need for more flexible peacetime procedures and passed the Armed Services Procurement Act in 1947. The ASPA was viewed by the legislative and executive branches from differing perspectives. The Service Secretaries stated that the "primary purpose of the Act is to permit the War and Navy Departments to award contracts by negotiation when the National Defense or sound business judgment dictates the use of negotiation."[18] Congressional intent, however, provided "for a return to normal purchasing procedures through the advertising-bid method on the part of the armed services."[19] The ASPA, of course, does both by requiring the use of formal advertising, with negotiation authorized by prescribed exceptions.

In 1949, Congress adopted the principles of the ASPA and passed the Federal Property and Administrative Services Act (FPASA) to govern civilian procurement procedures. All but two of the ASPA's exceptions to formal advertising, the need for a facility for mobilization and requirements involving substantial investment or long lead-times, were included in the FPASA. 41 U.S.C. § 252(c). Based on recommendations by the Commission on Reorganization of the Executive Branch, the First Hoover Commission, the FPASA created the General Services Administration (GSA) to serve as a central organization for federal services such as supply and procurement, records management, and building management. Control of procurement policy and, to a limited extent, certain procurement operations was conferred upon the GSA at that time.

In the years following the enactment of the ASPA and the FPASA, negotiation became less the exception and more the rule. The two factors primarily responsible for the proliferation of negotiated procurements were the development of technical military hardware and the Korean war. Technology, in general, and rocketry, solid-state electronics, and aerospace technology in particular, experienced a quantum jump in sophistication and complexity, requiring greater flexibility in procurement. By 1960, negotiation accounted for over 85 percent of all federal contract dollars.[20]

As a result, the ASPA was amended in 1962 to encourage the use of formal advertising and to clarify procedures and obtain more competition in negotiated procurement. The amendments strengthened the requirement for formal advertising by requiring its use "whenever feasible and practicable under the existing conditions and circumstances." 10 U.S.C. § 2304(a). The amendments also required DoD and NASA to conduct "written and oral discussions" with all firms "within a competitive range"

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[18] House Armed Services Committee, Facilitating Procurement of Supplies and Services by the War and Navy Departments (80–109), 80th Cong., 1st Sess., March 10, 1947, p. 26.

[19] Senate Armed Services Committee, Armed Services Procurement Act of 1947, (80–571), 80th Cong., 1st Sess., July 16, 1947.

[20] Subcommittee on Defense Procurement of the Joint Economic Committee, Economic Aspects of Military Procurement and Supply, 86th Cong. (1960).

in negotiated procurements. 10 U.S.C. §2304(g). In addition, the amendments addressed congressional concern over noncompetitive contract prices being negotiated based on defective data submitted by contractors. This provision of the amendments, referred to as the Truth in Negotiations Act, required contracting officers to obtain all "current, complete, and accurate" cost and pricing data submissions from contractors in certain negotiated contracts over $100,000. 10 U.S.C. §2306(f). The dollar threshold for defense procurements was raised to $500,000 in 1981.[21]

Negotiated contracts continued to prevail as the "preferred" method of procurement throughout the 1960's and 1970's. In 1969 Congress established the Commission on Government Procurement (Pub. L. No. 91–129), a twelve-member, bipartisan body composed of representatives from the legislative branch, the executive branch, and the private sector, to study the federal procurement process and recommend changes to improve its efficiency. The Comptroller General of the United States was made a statutory member. The commission completed its two-and-one-half-year study in December 1972 and submitted its report to Congress with 149 recommendations, the first of which was to establish an Office of Federal Procurement Policy.[22]

The commission's second recommendation was to enact legislation to eliminate inconsistencies in the ASPA and the FPASA by consolidating the two statutes and thus providing a common basis for procurement policies and procedures applicable to all executive agencies.[23] Within this context, the commission further recommended that formal advertising should be retained as the preferred procurement procedure when the number of sources, existence of specifications, and other conditions justify its use, and that competitive negotiation should be authorized as "an acceptable and efficient alternative."[24] The commission stated in its 1972 report: "the point is not that there should be more negotiation and less advertising. but that competitive negotiation should be recognized in law for what it is: namely, a normal, sound buying method which the Government should prefer when market conditions are not appropriate for the use of formal advertising."[25]

The Office of Federal Procurement Policy (OFPP) was established in 1974 (Pub. L. No. 93–400), within the Office of Management and Budget, to provide overall direction in procurement policy. The OFPP was empowered with directive authority to prescribe policies, regulations, procedures, and forms relating to procurement, which agencies were to follow.[26] The 1979 amendments to the OFPP Act (Pub. L. No. 96–83), which reauthorized the Office for another four years, redirected the OFPP to focus on three goals: the development of a uniform procurement system, a management system which would implement and enforce the procurement system, and legislative changes needed to implement both systems.[27] The OFPP submitted an integrated proposal for a Uniform Federal Procurement System on February 26, 1982, which incorporated many of the commission's recommendations and served as a base for the committee's procurement reform efforts.[28]

In addition to OFPP's proposal, Executive Order 12352 on Federal Procurement Reforms was issued on March 17, 1982, which confirmed the administration's commitment to improving the effectiveness and efficiency of the procurement process. One of the directives included in the executive order requires that criteria be established for "enhancing effective competition and limiting noncompetitive actions."

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[21] Conference Report on Department of Defense Authorization Act, 1982 (311), 97th Cong., 1st Sess., November 3, 1981, p. 122.

[22] The commission's recommendation was to "establish by law" a central Office of Federal Procurement Policy in the Executive Office of the President, preferably in the Office of Management and Budget, with specialized competence to take the leadership in procurement policy and related matters. Supra note 3 at 9.

[23] Id. at 15.

[24] Id. at 20.

[25] Id. at 21.

[26] The commission specifically recommended that the OFPP should operate on a plane above the procurement agencies and have direct rather than merely advisory authority. Id. at 2.

[27] The House Committee on Government Operations stated in its report on reauthorization of the OFPP that the "sweep and vagueness of the OFPP's mandate have impaired the Office's effectiveness during its first five years," and recommended that its focus be redirected to accomplish these three goals. H. Rep. 178, Office of Federal Procurement Policy Act Amendments of 1979, 96th Cong., 1st Sess., May 15, 1982.

[28] Office of Federal Procurement Policy, Proposal for a Uniform Federal Procurement System. February 26, 1982. See Hearing before the Senate Subcommittee on Federal Expenditures, Research, and Rules of the Committee on Governmental Affairs, The Administration's Proposal for a Uniform Federal Procurement System, 97th Cong., May 5, 1982.

Despite the emphasis on competition in contracting and the benefits to be derived from its use, noncompetitively negotiated contracts account for the majority of government procurement dollars. According to figures compiled by the Federal Procurement Data Center (FPDC), out of a total of $146.9 billion awarded by government agencies in fiscal 1982 for contracts over $10,000, $54.4 billion was awarded competitively, $79.2 billion was negotiated noncompetitively, and $13.3 billion used other methods.[29]

Not all government contracts can be awarded competitively. Too often, however, agencies contract on a sole-source basis when competition was available. A July 1981 GAO report, entitled DoD Loses Many Competitive Procurement Opportunities (PLRD–81–45), estimated that the Defense Department failed to obtain available competition in awarding $289 million in new fiscal 1979 contract awards surveyed. Moreover, an April 1982 GAO report, entitled Less Sole-Source, More Competition Needed in Federal Civil Agencies' Contracting (PLRD–82–40), found that this problem was not confined to the DoD. According to this report, the six civil agencies reviewed, which awarded new sole-source contracts totaling $538.1 million, failed to obtain competition on an estimated 40 percent of the contract awards. The dollar amounts for both defense and civil agencies represent initial contract obligations, which may be substantially increased through later contract modifications.

Hearings held in the Governmental Affairs Committee during the 96th and 97th Congresses confirm these findings. The Oversight of Government Management Subcommittee examined year-end spending during three days of hearings in 1979 and 1980, and found a relationship between negotiating "under the crunch" and unnecessary noncompetitive contracting. In its July 1980 report, the subcommittee recommended that additional restrictions were needed on sole-source procurements.[30]

On October 21, 1981, the Governmental Affairs Committee convened a series of hearings on the acquisition process in the Defense Department.[31] Although the purpose of the hearings was to examine the range of problems in defense procurement—inaccurate cost-estimating, sole-source contracting, and "gold-plating," among others—much of the testimony focused on the lack of competition in DoD contracting. The second day of hearings, October 27, 1981, concentrated on Deputy Secretary Frank Carlucci's proposed remedies for DoD's procurement problems. Absent from the original list of thirty-one "Carlucci Initiatives," however, was the need for more competition in DoD contracting. In response to congressional concerns, a thirty-second initiative on competition was added, which simply recommended that the services and defense agencies be required to establish management programs to increase competition by setting objectives.[32]

Witnesses at these two days of hearings, including Charles Bowsher, Comptroller General, Alice Rivlin, Director of the Congressional Budget Office, Norman Augustine, Chairman of the Defense Science Board, Deputy Secretary Carlucci, DoD, and Dr. Jacques Gansler, Vice President of the Analytic Sciences Corporation, indicated that the failure to use competition in awarding contracts for the production, and in many cases the design, of a major weapons system was a serious and costly problem. For those contracts which were competed, moreover, the witnesses expressed concern that the government placed more emphasis on obtaining one-time competition for the award of a contract with subsequent sole-source development and production than it did on maintaining competition during the life of the acquisition process.

In response to these concerns, Senators William V. Roth, Jr., Carl Levin, and I introduced the Competition in Contracting Act of 1982 (S. 2127) on February 23,

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[29] Federal Procurement Data Center, "Special Analysis 8, Federal Contract Actions and Various Contracting Operations by Executive Department and Agency," fiscal 1982.

[30] Senate Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, Hurry-up Spending, 96th Cong., November 29, 1979, April 30 and May 1, 1980. Based on numerous cases of government officials awarding noncompetitive contracts at fiscal year's end, the subcommittee recommended that additional restrictions on sole-source contracting were needed. Subcommittee report on "Hurry-up Spending," 96th Cong., 2nd Sess., July 23, 1980, p. 41.

[31] Committee on Governmental Affairs, Acquisition Process in the Department of Defense, 97th Cong., October 21 and 27 and November 5, 1981.

[32] In a September 1982 memorandum from Secretary of Defense Caspar Weinberger to the Secretaries of the Military Departments et al., greater attention is given to obtaining competition in the placement of contracts by all DoD components. Secretary Weinberger reiterates and elaborates on Deputy Secretary Carlucci's thirty-second initiative by stating that all personnel involved in the acquisition process, from the first identification of the requirement through the execution of the purchase, should place maximum emphasis on competitive procurement.

1982.[33] Subsequent cosponsors of S. 2127 included Senators Warren Rudman, David Pryor, Robert Kasten, John Heinz, John P. East, Paula Hawkins, George J. Mitchell, and William Proxmire. The bill was referred to the Governmental Affairs Committee and subsequently to the Federal Expenditures, Research, and Rules Subcommittee, which held a hearing on S. 2127 and the OFPP proposal for a Uniform Federal Procurement System on May 5, 1982.[34] The subcommittee voted unanimously on August 17 to report S. 2127 favorably, with amendments. The Governmental Affairs Committee held a hearing on S. 2127 on June 29, 1982[35] and voted 12 to 0 to report the bill on October 1; however, the Senate was unable to consider S. 2127 before adjourning sine die on December 23.

I re-introduced the Competition in Contracting Act of 1983 (S. 338) on February 1, 1983, with Senators Roth, Levin, Rudman, Percy, Durenberger, Pryor, Proxmire, and Mitchell as original cosponsors.[36] Senators Stevens and Danforth subsequently cosponsored the bill. S. 338 was referred to the Governmental Affairs Committee and to its Oversight of Government Management Subcommittee, which assumed jurisdiction over procurement issues during the 98th Congress. The subcommittee voted 4 to 0 on March 1 to report S. 338 favorably, with amendments. The Government Affairs Committee voted 10 to 0 to report the bill on March 17. Pursuant to an agreement of the chairmen and ranking minority members of the Governmental Affairs and Armed Services Committees, S. 338 will be sequentially referred to the Armed Services Committee for consideration of the amendments to the ASPA (Title II of S. 338).

S. 338 is supported by the Administration, the General Accounting Office, the American Bar Association, and several contracting associations. The record established during the past two Congresses is supplemented by comments solicited from the Office of Federal Procurement Policy, the Departments of Defense, Energy, Health and Human Services, Agriculture, Interior, and Transportation, NASA, GSA, Veterans Administration, Small Business Administration, and all the major contracting associations, including the National Security Industrial Association, Aerospace Industries Association, Computer and Business Equipment Manufacturers Association, Scientific Apparatus Makers Association, Electronic Industries Association, Associated General Contractors of America, and Smaller Business Association of New England.

At its June 29, 1982 hearing last Congress, the committee received testimony from Professor John Cibinic, George Washington University, Constantine Polites, President of the Constantine N. Polites Company, William A. Long, Deputy Undersecretary of Defense for Research and Engineering (Acquisition Management) and Robert Gilroy, Associate Director of the Procurement, Logistics, and Readiness Division, U.S. General Accounting Office. The consensus among these witnesses was that competition in government contracting may be the requirement, but not the practice. Evidence and testimony presented to the committee provided a range of explanations for the government's over-reliance on sole-source contracting. The following findings were identified as problems in the present procurement system:

- The current procurement statutes are inadequate. The emphasis on formal advertising overshadows negotiation as a legitimate competitive procurement procedure.
- The exceptions provided for negotiation are used inappropriately, in some cases, to justify sole-source procurement.
- The rush to spend appropriated funds at the end of the fiscal year, often due to ineffective procurement planning, curtails competition.
- Market research, used to determine the availability of competition in the marketplace, is often not being done.
- Overly-detailed specifications unnecessarily restrict the procuring agency from considering acceptable alternatives, and often result in only one contractor capable of meeting the agency's needs.
- In some agencies, there is an institutional bias against competition, or a proclivity for sole-source contracting, which discourages contracting officers from obtaining competition.
- The more concentrated the marketplace, the less opportunity there is for competition.

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[33] Statements on S. 2127, Cong. Rec., 97th Cong., 2nd Sess., February 23, 1982, p. 994.

[34] Senate Subcommittee on Federal Expenditures, Research, and Rules of the Committee on Governmental Affairs, The Administration's Proposal for a Uniform Federal Procurement System, 97th Cong., May 5, 1982.

[35] Committee on Governmental Affairs, Competition in the Federal Procurement Process, 97th Cong., June 29, 1982.

[36] Statements on S. 338, Cong. Rec. 98th Cong., 1st Sess., February 1, 1983, p. 810.

- Legitimate reasons preclude the use of competition for some contracts.

A. Statutory Shortcomings

The ASPA and the FPASA have two primary shortcomings: first, they do not give proper accordance to negotiation as a legitimate competitive procurement procedure; second, they do not adequately restrict the use of noncompetitive negotiation. If contracting officers need to consider factors other than price in making awards or must have discussions with prospective contractors, they are required to satisfy one of the exceptions that permit negotiation. 10 U.S.C. §2304(a); 41 U.S.C. §252(c). For all practical purposes, therefore, competitive negotiation lacks recognition as a bona fide competitive procedure.

CONTRACTING PROCEDURES

[Dollars in billions]

	Formal advertising	Competitive negotiation	Noncompetitive negotiation	Total contracts *
All Departments and Agencies:				
1980	9.8	25.7	53.7	99.7
1981	9.8	36.9	66.9	123.4
1982	11.5	42.9	79.2	146.9
DoD:				
1980	5.7	17.6	42.7	75.9
1981	6.2	27.6	53.5	96.4
1982	8.4	32.7	63.5	117.0
DoE:				
1980	.3	1.7	5.8	7.8
1981	.3	1.6	8.2	10.1
1982	.9	2.6	11.1	13.8

* Includes procurements for foreign governments and contracts which are tariffed or regulated.

Despite the emphasis on formal advertising, almost 90 percent of the value of all federal contracts (over $10,000) awarded in fiscal 1982 were negotiated. Of these contracts, $42.9 billion were negotiated competitively—more than three times the amount which were formally advertised. In addition, the use of competitive negotiation procedures increased by over $17 billion during the past two years, while the value of formally advertised contracts has increased by less than $2 billion. In the chart above, FPDC data on contracting procedures show that competitive negotiation, compared to formal advertising, is actually the "preferred" competitive procurement procedure. Data are provided for contracts awarded by all federal departments and agencies. For purposes of comparison, data are also provided for the Departments of Defense and Energy, which have the largest defense and civilian procurement budgets.[37]

A consequence of the present statutory framework is that agencies may be required to formally advertise when negotiation is more appropriate. Donald Sowle, Administrator of the Office of Federal Procurement Policy, testified at the May 5, 1982, Federal Expenditures Subcommittee hearing that, in those situations, the rigid requirements of formal advertising may inhibit the procuring agency from taking advantage of the competitive marketplace:

> Most government requirements cannot be described using [formal advertising procedures] since detailed specifications do not generally exist and it would be too costly to develop. As a result, the number of suppliers tend to shrink, in those instances where detailed specifications are available, to those few—or in some cases only one—who perform to unique government specifications. The government often becomes the sole or major customer of these contractors.[38]

When competitive negotiation is appropriate, moreover, agencies are required to indulge in what the commission regarded as "expensive, wasteful, and time-consuming" procedures to justify its use.[39] Recognizing that competitive negotiation is a legitimate competitive procurement procedure, the committee believes that the ASPA and the FPASA should be amended to remove this unnecessary restriction.

Restrictions are needed, however, to control the use of noncompetitively negotiated contracts. Of the $146.9 billion in contracts (over $10,000) awarded in fiscal 1982, approximately 54 percent were negotiated noncompetitively. The Defense De-

[37] Supra note 29, fiscal years 1980–1982.
[38] Statement of Donald Sowle, Administrator of the OFPP, supra note 34.
[39] Supra note 3 at 21.

partment sole-sourced 54.3 percent of its contracts, while the Department of Energy awarded 80.4 percent of its contracts on a noncompetitive basis.[40] Therefore, a second, and more severe, shortcoming of the present statutes is the absence of any direct restriction on sole-source contracting.

B. Exceptions to Formal Advertising

Due to the lack of direct restrictions on noncompetitive contracting, the exceptions to formal advertising are often applied inappropriately to justify the use of sole-source procurement. Although agencies are required to compete negotiated contracts to the maximum extent practicable (10 U.S.C. § 2304(g); FPR 1–1.301–1), exceptions that permit an agency to negotiate also provide large loopholes for avoiding competition.

The justification most frequently invoked is the "competition is impracticable" exception, which agencies sometimes improperly use to award sole-source contracts. 10 U.S.C. § 2304(a)(10); 41 U.S.C. § 252(c)(10).[41] The use of this exception has been allowed by the comptroller general in bid protest decisions when the government's needs could only be satisfied by property or services which are unique. This exception is not to be used, however, to justify negotiation where the purpose in undertaking the procurement is to satisfy more that the agency's minimum needs.

USE OF NEGOTIATION EXCEPTION AUTHORITY

[Dollars in billions]

	Contracts negotiated noncompetitively	"Impracticability" exception used	Percent
All Departments and Agencies:			
1980	53.7	27.9	51.9
1981	66.9	40.0	59.7
1982	79.2	44.4	56.1
DoD:			
1980	42.7	23.1	54.1
1981	53.5	33.9	63.4
1982	63.5	36.7	57.8
DoE:			
1980	5.8	1.1	18.9
1981	8.2	1.5	18.3
1982	11.1	3.1	27.9

While the use of this exception only permits negotiation and does not automatically allow for noncompetitive award, it is significant that 56.1 percent of the value of sole-source contracts awarded in fiscal 1982 were made pursuant to this justification, a decrease from 59.7 percent the year before. The Department of Defense "justified" a majority of its sole-source contracts under this exception, 63.4 percent in fiscal 1981 and 57.8 percent in fiscal 1982, while the Department of Energy used the "otherwise authorized by law" exception (10 U.S.C. § 2304(a)(17); 41 U.S.C. § 252(c)–(15)), another sole-source exception, to "justify" over 73 percent of its noncompetitive procurements in fiscal 1982.[42]

By using the broad exceptions to formal advertising as a means to sole-source contract, the justification for awarding a contract noncompetitively is hidden. Revisions are needed in the present statutory framework which would shift the focus from having to justify the use of negotiation to having to justify the use of noncompetitive negotiations. The committee realizes that sole-source contracting is necessary in certain situations, but strongly believes that tighter control and greater visibility are needed to ensure its proper use.

C. Year-end Spending

The oversight of Government Management Subcommittee determined "during its hearings on "Hurry-up Spending" that many agencies were not using the "petition is impracticable" exception properly. The subcommittee found that an agency's need to award a contract by the end of the fiscal year often became the motivation behind

[40] Supra note 29, fiscal 1982.

[41] The regulations provide examples—eighteen in the DAR and fifteen in the FPR—when agencies are authorized to use this exception, which makes it fairly easy to invoke. DAR 3.210.2; FPR 1–3.210.

[42] Supra note 29, fiscal years 1981–1982.

unnecessarily restrictive specifications that subsequently made competition "impracticable."[43]

In response to these oversight hearings, two Inspector General reports from the Department of Agriculture (USDA) and Energy were issued on year-end spending. The December 14, 1981, USDA report found that the time pressures at year-end curtailed competitive contracting in many cases. According to this report, thirty-seven procurements totaling $8 million were awarded at the end of fiscal 1980 through an abbreviated procurement process.[44] The September 23, 1982, DoE report found that year-end spending, coupled with compressed leadtimes for processing, led to a generally rushed atmosphere in which contracts were inadequately reviewed and insufficiently competed. Of those DoE procurements in which competition was feasible, only 59 percent were awarded competitively in fiscal 1980, a decline from 82 percent in fiscal 1979.[45]

The FPDC data provide additional insight. For fiscal 1979, data provided for the Oversight Subcommittee's "Hurry-up Spending" hearings showed that several civilian agencies had substantial increases in noncompetitive awards at year-end. For example, the State Department awarded 92.5 percent of its total fiscal 1979 noncompetitive contracts in the fourth quarter, 58.2 percent in the last month alone. The comparable figures for the Labor Department were 81.8 percent and 50.1 percent; for the Small Business Administration, 70.8 percent and 62.8 percent: and for the Veterans Administration, 48.6 percent and 31 percent.[46]

For fiscal years 1980 and 1981, FPDC data for all federal departments and agencies show that the percentage of total contract dollars awarded noncompetitively through "hurry-up spending" is increasing. FPDC data for the fourth quarter of fiscal 1982 are not included because the figures are subject to change.[47]

YEAR-END SPENDING

[Dollars in billions]

	Contracts in 4th qtr	Contracts negotiated noncompetitively in 4th qtr	Percent
All Departments and Agencies:			
1980	29.1	14.3	51.9
1981	39.0	22.6	58.1

The Oversight Subcommittee determined from its hearings that agencies which do not develop advance procurement plans are frequently inundated with procurement requests during the fourth quarter of the fiscal year, severely constricting the contracting officers' ability to obtain competition. The subcommittee recommended in its July 1980 report that the Office of Management and Budget should direct all federal agencies to develop procurement agendas in advance of each fiscal year.[48] While the OFPP implemented this recommendation in 1981 through policy letter 81–1, inadequate advance procurement planning remains a problem and warrants a statutory base in the ASPA and the FPASA.

D. Insufficient Market Research

Competition in contracting depends on the procuring agency's understanding of the marketplace. In addition to advance procurement planning, market research is essential in developing this understanding. Agencies which fail to scope the market for potential competitors—whether by telephone or publicizing in the Commerce Business Daily (CBD)—often resort to sole-source contracting when competition is available.

Presently, agencies are required by law to publish a pre-award notice in the CBD for all competitive and noncompetitive defense procurements over $10,000 and civilian procurements over $5,000, unless they fall within one of the prescribed excep-

[43] Oversight Subcommittee, Hurry-up Spending, supra note 30 at 21.

[44] United States Department of Agriculture, Office of Inspector General, Multi-Agency Audit, Procurement Year-end Spending, Audit Report 50550–3–Hy, December 14, 1981.

[45] U.S. Department of Energy, Office of Inspector General, Year-end Spending by the Headquarters Procurement Office in Fiscal Year 1980, DoE/IG–0173, September 23, 1981.

[46] A complete chart of noncompetitive awards by percentages and quarters for fifteen departments and agencies for fiscal 1979, based on data prepared by the FPDC for the Oversight Subcommittee, is provided in the GAO report entitled Government Agencies Need Effective Planning to Curb Unnecessary Year-End Spending (PSAD–80–67), July 28, 1980, p. 15.

[47] Supra note 29, fiscal years 1980–1981.

[48] Supra note 30 at 40.

tions. 15 U.S.C. §637(e). The regulations require that agencies publicize in the CBD for ten days before the issuance of solicitations to provide potential competitors, who are not on current bidders lists, time to prepare their submissions. Once the solicitations have been issued, the regulations provide that bidding time should not be less than twenty days for the procurement of standard commercial articles or services and thirty days for all other procurements. DAR 1–1003.2; FPR 1–1.003–6.

Despite the statutory and regulatory requirements, however, Robert Gilroy testified at the June 29, 1982, hearing that agencies are guilty of conducting insufficient market research. Mr. Gilroy stated that the civilian agencies reviewed in the GAO's April 1982 study rarely publicized pre-award notices in the Commerce Business Daily. The GAO found that agency personnel published pre-award notices in the CBD, which invited bids or requested proposals on the prime contract, in only 2 percent of the awards reviewed. A market search was conducted on only an estimated 15 percent of the awards, including the 2 percent which were publicized in the CBD.[49]

While the CBD is not the only means of notifying businesses of prospective government contracts, the failure to publish a pre-award notice can seriously limit competition because some businesses—particularly small businesses—rely heavily on the CBD to identify contract and subcontract opportunities. This is particularly true for those contractors which have not previously done business with the government, and in the case of small businesses, those which do not have the resources to continually contact all the agency procurement offices which might afford them contract opportunities.[50]

The committee believes that the time periods for publication provided in regulation should be codified to ensure agency compliance with the CBD notice requirement.

E. Restrictive Specifications

Executive agencies are required by law to state purchase specifications for formally advertised contracts in a manner which permits full and free competition. 10 U.S.C. §2305(a); 41 U.S.C. §253(a). There are similar requirements for negotiated contracts. 10 U.S.C. §2304(g); FPR 1–3.101(d). Considered by Professor John Cibinic to be the "cornerstone of competitive procurement,"[51] specifications serve initially as the fundamental expression of the agency's need and, in the contract award, as the baseline for the evaluation of offers. Despite the present regulatory requirement that specifications shall be "a clear and accurate description of the technical requirements for a material, product, or service" (DAR 2–101(i); FPR 1–1.305), however, witnesses at the June 29, 1982 hearing testified that agencies have used specifications to restrict competition by unnecessarily defining their needs too narrowly.

While all details in specifications are potentially restrictive in that they narrow the range of acceptable offers, Chairman Roth stated at the hearing that "government specifications . . . are often so restrictive or outdated that only one firm can qualify to bid on the contract."[52] The reasons for improper specifications in some cases are bias or favoritism, and in others, it is the lack of sufficient personnel capable of developing appropriate specifications.

In one example, the Navy determined that Constantine Polites, a small businessman and a witness at the hearing, was nonresponsive for a contract because his scaffolding coupler exceeded the Occupational Safety and Health Administration (OSHA) requirement stated in the specification, despite the fact that his product cost considerably less than his competitor's. In order for Mr. Polites to have competed for the contract, he would have had to reduce the quality of his product to meet the purchase specification.[53]

The consequence of using a restrictive specification in this case, in my judgment, is that a capable contractor is precluded from competing. Mr. Polites' product was higher quality at a lower price than his competitor's and yet because of the way in

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[49] Statement of Robert Gilroy, supra note 35. Hearing Record at 68.

[50] According to the Senate Small Business Committee report on S. 1947 (H.R. 97–399), small businesses are almost totally dependent on the synopses published in the Commerce Business Daily as their means of obtaining procurement information because they are unable to support marketing staffs to deal with geographically dispersed government purchasing offices. The committee's report to accompany S. 1947, which was passed by the Senate last Congress, states that "the synopses of the contracting opportunities published by the government are a vital source of information for small businesses if received in sufficient time and with sufficient detail."

[51] Statement of Professor John Cibinic, supra note 35, Hearing Record at 24.

[52] Statement of Chairman William Roth, supra note 35, Hearing Record at 4.

[53] Testimony of Constantine Polites, supra note 35, Hearing Record at 27–30.

which the specification was written, it effectively cut him out of the business and limited it to a sole-source contract.[54]

Another example of restrictive government specifications involved an Army contract for closed-circuit television systems. According to Mr. Gilroy's testimony, the Army needed camera equipment which did not unnecessarily hamper a soldier's ability to do basic tasks. While the general requirements were simple enough, the Army established three pounds (plus or minus 0.5 pounds) as its minimum camera weight need and 800 as the required line resolution. Because only one contractor could meet the specific camera weight and line resolution requirements, the Army awarded a $150,000 contract noncompetitively. Other contractors offered products that met the Army's minimum requirements, but were determined to be nonresponsive.[55]

The committee agrees with Mr. Gilroy's recommendation that agencies should take steps to ensure that contract specifications are not unnecessarily restrictive. General guidelines should be established in the ASPA and the FPASA which require specifications to be consistent with the agency's minimum needs and allow restrictive provisions only to the extent necessary to meet those needs.

F. Institutional Bias

If there is an institutional bias against competition in contracting, it lies, in part, in the role of the contracting officers who are responsible for maximizing competition. Mr. Gilroy testified that contracting officers often make arbitrary decisions that no capable firms other than the sole source were available and thus do not attempt to attract other sources.[56] Professor Cibinic referred to this problem in his testimony at the June 29 hearing as a "closed-minded attitude."[57] Agency officials become accustomed to, or dependent on, a particular contractor's product and exert pressure on contracting officers to permit sole-source awards.

Risk is a contributing factor. Generally, agency officials have an easier time if they stay with the same contractor throughout the procurement process. For example, the contractor may have amassed the knowledge required for successful production—knowledge which is not easily transferred to a new contractor. Over the years of development and production, moreover, agency and contractor personnel develop a good working relationship, which could be lost if new contractors were involved.

Contracting officers who want to open contract awards to new firms may find their hands tied. Program managers often request specific products or services that only one firm can provide or delay sending the procurement request until time constraints prohibit the contracting officer from obtaining available competition. In its recent reports on DoD and civilian agency sole-source contracting the GAO found that contracting officers often acquiesced to specific procurement requests from headquarters or accepted, without adequate support, assertions made by technical and end-user personnel that "justified" noncompetitive procurements.[58]

The committee believes that stronger safeguards are needed in the statutes against superfluous sole-source contracting. Improvements in the present recording and reporting requirements should be implemented to monitor who within the agency required and approved the decision to negotiate noncompetitively and what the justification was for going sole-source. In addition, a qualified professional in each procuring agency should be appointed to serve as an advocate for competition to ensure that every effort made from the time the agency's need is identified through the execution of the purchase allows for effective competition.

G. Concentrated Industrial Base

The lack of competition in government contracting is not solely the result of procedural problems. In some cases, sole-source contracting may be related to the degree of concentration in the industrial base: the more concentrated the marketplace, the less opportunity for competition.

At the prime-contractor level, the top twenty-five contractors currently hold approximately 50 percent of the value of all DoD contracts, and only eight firms conduct 45 percent of all DoD research. The degree of concentration at the sub-contractor level is much greater, where entrance and exit of the marketplace is easier. Unfortunately, more firms exit than enter. The aerospace industrial base, for example,

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[54] Supra note 35, Hearing Record at 29.
[55] Supra note 49, Hearing Record at 69–70.
[56] Id. Hearing Record at 67.
[57] Testimony of Professor John Cibinic, supra note 35, Hearing Record at 11.
[58] U.S. General Accounting Office, "DoD Loses Many Competitive Procurement Opportunities" (PLRD–81–45), July 1981 and "Less Sole-Source, More Contracting Needed in Federal Civil Agencies' Contracting" (PLRD 82–40), April 1982.

lost close to 2,000 subcontractors between 1968 and 1975.[59] The result, oftentimes, is the availability of only one prime- or sub-contractor capable of meeting the government's needs for a particular contract.

The government, however, actually may encourage the shrinkage of the industrial base by relying on the same contractor time and again. Noncompetitive contracting may further concentrate the industrial base. which, in turn, leads to less competition. While there is no quick fix for strengthening the U.S. industrial base, increased use of competitive contracting in general and dual-sourcing in particular will broaden the base at both the prime and lower tiers. The committee encourages dual-sourcing for major weapons system procurement and believes that the ASPA and the FPASA should be amended to authorize its use when it would be in the interest of industrial mobilization and when it would increase competition and likely result in the reduction of overall costs.

H. Legitimate Reasons

The government is permitted to contract noncompetitively under certain conditions; however, the statutes and regulations provide little guidance on what justifies a legitimate sole-source decision. As a result, agencies have come to rely on comptroller general decisions in bid protests.[60] The comptroller general has accepted the following as valid reasons for sole-source contracting: the agency has statutory authority to award the sole-source contract; the government's need for property or service is so urgent that there is not enough time to obtain competition; the sole-source justification demonstrates there is a reasonable basis for concluding that only one contractor is capable of and interested in meeting the government's minimum requirements; the government needs to award the contract to a particular source in order to create or maintain an essential industrial capability or for purposes of industrial mobilization; the terms of an international agreement require a noncompetitive contract; and disclosure to more than one source of the property or services to be obtained would jeopardize the national security.

The problem, however, is that agencies go beyond these accepted situations and award sole-source contracts when competition is available. Although much attention has focused on sole-source contracting over recent years, the problem persists. Unless sole-source contracting is limited only to those situations in which it is truly warranted, the government stands to lose considerable benefits and to incur greater costs.

IV. PROVISIONS OF S. 338

The Competition in Contracting Act remedies this problem by providing a new statutory framework which promotes the use of competition and imposes greater restrictions on the awarding of noncompetitive contracts. The provisions of S. 338 apply to all government procurements except those "otherwise authorized by law." such as the procurement of architectural and engineering services authorized by the Brooks Act, 40 U.S.C. § 541 et seq.[61] For purposes of uniformity, the amendments to the Federal Property and Administrative Services Act and the Armed Services Procurement Act, set forth in Titles I and II of S. 338, respectively, are identical. The major provisions of S. 338:

A. Establish an Absolute Preference for Competition

The procurement statutes promote formal advertising as the primary competitive procedure, despite the fact that negotiation, in practice, is used almost exclusively. The committee recognizes that competitive contracting takes more than one form and feels that agencies should be able to negotiate competitively without having to justify its use. Presently, contracting officers must develop a written justification supporting a decision to negotiate rather than to formally advertise. 10 U.S.C. § 2310(b); 41 U.S.C. § 257(c).

S. 338 removes the restriction from—and the written justification required for—competitive negotiation and places it on a par with formal advertising. Together, they constitute competitive procedures, with exceptions provided for noncompetitive

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[59] Jacques S. Gansler, The Defense Industry (Cambridge, Massachusetts: The MIT Press, 1980), p. 36.

[60] The comptroller general, as head of the General Accounting Office, renders legal decisions when an interested party, such as an individual or a firm doing business or seeking to do business with the government, protests against the award of a contract.

[61] The committee recognizes the procurement of architectural and engineering services, as authorized by the Brooks Act, to be competitive and fully consonant with the purposes of S. 338. The Brooks Act requires public announcement of prospective A/E contracts in the CBD and provides that the evaluation and award of such contracts will be based on qualification rather than on price as is required in the ASPA and the FPASA.

procedures, i.e., sole-source contracting. Within this new statutory framework, executive agencies are required to use competitive procedures whenever possible in awarding federal contracts for property and services. Agencies would be permitted to invite sealed bids and make award without discussions (formal advertising) or request proposals and make award with discussions (competitive negotiation), whichever competitive procedure is most conducive to the conditions of the contract. Generally the nature of the property or services to be acquired and the market circumstances determine the appropriate competitive procedure to be used.[62]

The objective, conceptually, is to establish an absolute preference for competition and, practically, to provide more flexibility in contracting. William Long, Deputy Undersecretary for DoD Acquisition Management, testified at the June 29, 1982, Governmental Affairs hearing that this new approach to competitive procurement best represents the real procurement world:

> For many years, we have been troubled that many knowledgeable people have equated competition to formal advertising alone, overlooking the use and benefits of competitive negotiation. Eliminating the term "formal advertising" and uniting all types of competition under the broad term "competition" would be most helpful in this regard. Further, it would be beneficial and helpful in our efforts to more effectively obtain the benefits of competition in defense procurement.[63]

While competitive negotiation is recognized in S. 338 as a bona fide competitive procedure, the committee emphasizes that traditional formal advertising procedures are by no means cast aside. In fact, agencies are required under S. 338 to solicit sealed bids when (1) there is sufficient time, (2) award is based on price, (3) discussions are not necessary, and (4) more than one sealed bid is expected to be submitted.[64] Competitive negotiation may be used—without any justification—when any of these criteria are not met. By eliminating the need for a determination and finding to justify every negotiated contract, S. 338 lifts a great administrative burden off the shoulders of the executive agencies.

B. Require Agencies to Make an Affirmative Effort to Obtain Effective Competition

Executive agencies are not only required to obtain competition under the provisions of S. 338, but also to increase its effectiveness. Although "effective competition" is not amenable to rigid definition, a description is important to establish the thrust of the legislation and the rationale for many of its provisions. Five components characterize "effective competition": (1) the information required to respond to a public need is made available to prospective contractors in a timely fashion; (2) the government and contractor act independently; (3) two or more contractors act independently to respond to a public need by offering property or services which meet that need; (4) the government has expressed its need in a manner which promotes competition; and (5) there is no bias or favoritism, other than required by law, in the contract award.[65]

Effective competition is predicated on advance procurement planning and an understanding of the marketplace. S. 338 requires executive agencies to establish and maintain a procurement planning system which would ensure that the efforts of all procurement personnel are coordinated as early as practicable in the procurement process. Agencies are also required to conduct a market search. which would include publicizing a pre-award notice in the Commerce Business Daily, to invite competition on a prospective contract. Advance procurement planning and market research are interrelated functions which are used to varying degrees, depending on the dollar value of the procurement, complexity of the requirement, and urgency of the need.

Professor Cibinic testified at the June 29, 1982, hearing that codifying the present regulatory requirement for advance procurement planning and market research is necessary in view of unsatisfactory agency past performance:

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[62] Supra note 28 at 31.

[63] Statement of William Long, supra note 35. Hearing Record at 50.

[64] According to DoD testimony before the Procurement Subcommittee of the Senate Armed Services Committee (February 8, 1960): "There is no disagreement on what the basic prerequisites for formal advertising are. These criteria are: (1) a complete, adequate and realistic specification or purchase description must be available, (2) there must be two or more suppliers available, (3) the selection of the successful bidder can be made on the basis of price alone, and (4) there must be sufficient time. Formal advertising is an excellent method of procurement when these criteria are met. When any one of these criteria cannot be satisfied, it is a completely ineffective method of procurement."

[65] Senate Governmental Affairs Committee report on "Federal Acquisition Act of 1977" (95–715). 95th Cong., March 22, 1978, p. 18.

> Opportunities for obtaining or improving competition have often been lost because of untimely, faulty, or the total lack of advance procurement planning. Noncompetitive procurement or inadequate competition also has resulted many times from the failure to develop specifications or to perform adequate market surveys and identify potential sources. Some agencies have already implemented some of these reforms, but there are many opportunities for improvement. By requiring effective competition, Congress will serve notice on the agencies that they will need to do more than the minimum to comply with the statute.[66]

The committee recognizes, however, that the competitive procedures required for large purchases may not be cost-effective for small purchases. For procurements under $25,000, the costs of holding unlimited competition may exceed the benefits to be derived. Therefore, S. 338 provides a basis in statute for regulations to establish separate small purchase procedures, which would allow agencies to scale down their efforts as long as they obtain reasonable competition. The bill, however, specifically precludes agencies from dividing a large contract into several small ones for the purpose of taking advantage of the simplified small purchase procedures.

For the procurement of major weapons systems, S. 338 authorizes the use of dual-sourcing, which is a restrictive form of competitive procedure. Under dual-sourcing, an agency awards a contract to establish a second source for a property or service, using competitive procedures but excluding the incumbent contractor from competing, for the purpose of achieving parallel production capability for future competition. S. 338 permits the use of dual-sourcing when it would increase competition and likely result in the reduction of overall costs, or when it would be in the interest of industrial mobilization in the event of a national emergency. This latter condition is differentiated from the exception to competitive procedures through which agencies are permitted to award contracts on a sole-source basis to maintain industrial mobilization. Dual-sourcing would be justified for mobilization reasons, for example, when the Defense Department intends to award a competitive contract to establish another west coast shipbuilding capacity while excluding east coast shipyards from competing on the contract.

The Defense Department currently employs other legitimate techniques of competitive procurement, in addition to dual-sourcing, which are not precluded by S. 338. They include: (1) leader/follower—the developer or sole producer of a system (the leader company) furnishes manufacturing assistance and knowhow to a follower company, selected by the government using competitive procedures, to enable the follower company to become a second source of supply for the system and a future competitor; (2) joint teaming—a team of two or more firms is awarded a development contract, using competitive procedures, with the effort to be split among the firms; in the future, the two firms will compete independently for the production contract; and (3) competitive parallel development—two or more firms develop and validate separate competing systems to meet a specific need, resulting in a prototype demonstration or fly-off between the competitors.

The procedures for awarding contracts for common-use items under the Federal Supply Schedule are also accommodated by S. 338 and recognized by the committee to be competitive. The Federal Supply Service, within the General Services Administration, established the Federal Supply Schedule program to simplify the procurement process for commercially available items by entering into indefinite delivery type contracts with suppliers. A schedule of all such contracts, assembled in catalog form, is available to the agencies for ordering.

C. Permit Flexibility in Specification Development

In addition to advance procurement planning and market research, the affirmative effort required of agencies to obtain effective competition includes the development of nonrestrictive specifications. S. 338 sets forth broad guidelines for agencies to follow in defining their needs in order to maximize, rather than limit, competition. The first standard requires executive agencies to state their purchase specifications according to their needs and the market available to meet those needs. A second standard codifies the present regulatory requirement that specifications must be written in a nonrestrictive manner. This standard complements the first by ensuring that specifications are no more detailed or restrictive than is necessary to meet the agency's minimum needs.

The committee also recognizes that no one type of specification is appropriate for all procurements. Under the new solicitation procedures provided in S. 338, agencies are required to specify their needs in either functional, performance, or detailed de-

[66] Supra note 52, Hearing Record at 23.

sign terms, whichever will ensure timely performance of what they need and will promote the use of effective competition. This flexibility can enhance innovation and increase effective competition by permitting a range of distinct property or services to qualify as responsive when desirable, but permit the use of design specifications when most appropriate. Wherever practical, the committee feels that contractors should be told what the government needs and not how to do it. The advantage of this approach is that it allows the government to take advantage of the competitive marketplace.[67]

The OFPP's Acquisition and Distribution of Commercial Products (ADCOP) program has already resulted in the review and possible elimination of thousands of detailed specifications. The substitution of reasonable commercial item descriptions (CIDs), which are essentially performance specifications, for detailed specifications has resulted in projected savings of over $9 million in the purchase of meat for one year, almost $800,000 in the purchase of undershirts, $81,000 on towels, $65,000 on boxer shorts and bedsheets, and over $200,000 on such items as soy sauce and worcestershire sauce.[68] The use of functional specifications instead of detailed specifications, in one case, resulted in the reduction of the price of electrical parts by 94 percent.[69]

D. Establish Limited Exceptions for Noncompetitive Procurements

The committee recognizes that not all government contracts can be awarded competitively. The procurement statutes and regulations provide little guidance, however, on what reasons or circumstances justify a noncompetitive procurement. S. 338 provides six exceptions to competitive procedures which parallel the conditions under which the comptroller general has historically permitted agencies to award on a sole-source basis.[70] By shifting the emphasis from having to justify the use of negotiation, which has always been pro forma, to having to justify the use of noncompetitive procedures, S. 338 will restrict sole-source contracting to only those situations when it is truly necessary. The award of a contract on a sole-source basis would for the first time constitute a clear violation of statute unless permitted by one of the following exceptions.[71]

The first exception permits the use of noncompetitive procedures when the property or services needed by the government are available only from a single source and there are no competitive alternatives. This exception is considerably more restrictive than the "competition is impracticable" exception in the present statutes (10 U.S.C. § 2304(a)(10); 41 U.S.C. § 252(c)(10)), as it permits a sole-source procurement only when it is truly warranted. This exception requires that the agency's purpose in undertaking a sole-source procurement is to satisfy its minimum needs. If competitive alternatives can be made available by modifying the requirement or redescribing it in terms of the function or performance required without impairing the agency's mission responsibility, a noncompetitive procurement would not be permissible.

An example of a sole-source condition which is authorized under this exception would be a procurement for additional units or replacement items in which specified makes and models are required for standardization and interchangeability. Another example would be the award of a "follow-on" production contract when the non-recurring start-up costs incurred by the government to establish competitive alternatives, such as the transfer of technology from the incumbent contractor and the costs of government-provided unique tooling, outweigh the benefits of competition. The committee emphasizes that this first exception is not intended to serve as a "carte blanche" justification for awarding all "follow-on" contracts noncompetitively.

The second exception allows sole-source procurement when the agency's need for the property or services is of such unusual and "compelling urgency that the government would be seriously injured by the delay involved in using competitive procedures.[72] This exception strengthens the present "public exigency" exception (10

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[67] Supra note 28 at 30.

[68] Senate Governmental Affairs Committee report on "Authorizing Appropriations for the OFPP for Fiscal Years 1980 Through 1984, (96-144). 96th Cong., 1st Sess., May 15, 1979, p. 7.

[69] Supra note 28 at 11.

[70] The OFPP's "Proposal for a Uniform Federal Procurement System" provides seven exceptions to competition, six of which are almost identical to the exceptions in S. 338 and a seventh exception—when it is determined by the head of the agency that it is impracticable to obtain competition—which serves as a catch-all." Supra note 28 at 35.

[71] Supra note 51 at 22.

[72] The GAO has recommended that the implementing regulations should (1) set forth expedited procedures, consistent with the requirements for competitive procurement established in

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U.S.C. §2304(a)(2); 41 U.S.C. §252(c)(2)) by incorporating regulatory language which requires that the agency's need must be "compelling and of unusual urgency, as when the government would be seriously injured—financially or otherwise—if the supplies were not furnished by a certain date." DAR 3–202.2; FPR 1–3.202. An urgent situation is one which threatens immediate harm to health, welfare, or safety.

The third exception justifies the use of noncompetitive procedures when it is necessary to award a contract to a particular contractor in order to maintain an essential industrial capability in the United States or to achieve national industrial mobilization. This exception may be used where it is necessary to train, continue in production, or keep in business, facilities or supplies which are vital to national programs or to assure their availability in the event of a national emergency. This exception may also be used to maintain properly balanced sources of supply, or to establish second sources of supply, in the interest of industrial mobilization and future competition.

The fourth exception allows noncompetitive procedures to be used when required by international agreement or treaty or directed procurements for foreign governments when the cost is to be reimbursed by the foreign government. This exception deals with two separate situations. The first situation in which noncompetive procurements are justified is when an international agreement is made, e.g., between NATO countries, to purchase a particular weapons system from one source. The second situation involves U.S. procurement of property or services to be sold to another country. In this case, the foreign government chooses the contractor.

The fifth exception states that noncompetitive procedures are permitted when a statute provides that the procurement may be obtained through a specified source. This exception would apply, for example, to the purchase of property or services from workshops sponsored by the Committee for the Purchase from the Blind or Other Severely Handicapped. In addition, set-asides for small businesses owned and controlled by socially and economically disadvantaged persons, which are authorized under section 8(a) of the Small Business Act, could be awarded by an agency to the Small Business Administration on a sole-source basis using this exception. The SBA subsequently subcontracts to an eligible small business. Awards made by agencies under the Small Business Innovation Act (Pub.L. No. 97–279) would be another example of an appropriate use of this exception. Contracts for the construction or improvement of Indian reservation roads, awarded pursuant to the Buy Indian Act (25 U.S.C. §47), as well as other Indian preference statutes would be included under this exception.

The sixth exception allows noncompetitive procurement when disclosure to more than one source of the property or services to be obtained would jeopardize the national security. A security classification does not, however, automatically justify the use of this exception. Classified procurements can be competed among contractors with proper clearances. Only in those situations where national security could be threatened by disclosure of the solicitation package to more than one source would agencies be permitted to award a sole-source contract.

Absent from the list of exceptions to competitive procedures are unsolicited proposals. While it may be policy to foster and encourage unsolicited proposals, the regulations specifically state that such proposals should not be merely an advance proposal for a specific agency requirement which would normally be procured by competitive methods. DAR 4–901; FPR 1–4.901. The committee realizes that unsolicited proposals are often the source of innovative ideas, and recognizes that the incentive for contractors to submit unsolicited proposals may be lessened by subjecting them to the competitive procedures prescribed in S. 338. The committee's concern, however, is that unsolicited proposals often actually are solicited by the agencies.[73] In these cases, awarding a sole-source contract to a contractor which ostensibly submitted an "unsolicited" proposal would violate regulation and not be fair to potential competitors. Furthermore, the committee believes that truly meritorious, unsolicited proposals should prevail in a competitive award.

Presently, agencies are permitted by regulation to award a sole-source contract based on an unsolicited proposal when it has received a favorable technical evaluation, unless the substance of the proposal is available without restriction from another source, or a competitive procurement is otherwise appropriate. DAR 4–910(b); FPR 1–4.910(b). S. 338 would require agencies to conduct a market search, without

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S. 338, for obtaining at least limited competition in situations where there is not enough time to use the normal competitive process, and (2) require that agencies make reasonable use of such procedures.

[73] Supra note 30; also see hearings before the Senate Governmental Affairs Committee, 96th Cong., 2nd Sess., "Consultant Reform Act of 1980," August 19 and 20, 1980; and GAO report, "DoD Loses Many Competitive Procurement Opportunities," supra note 58 at 15.

disclosing the offeror's ideas, proprietary information, or solution contained in the unsolicited proposal, in order to determine whether the substance of the proposal is available without restriction from another source. Offerors may mark data contained in the proposal with a restrictive legend designating which data should not be disclosed outside the government. If the market search is successful in finding other competitors, a solicitation document stating the agency's minimum requirements will be provided. If the substance of the proposal is not available from any other competitors, sole-source award is permitted under the first exception.[74]

S. 338 further safeguards against unnecessary sole-source contracting by prohibiting agencies from using noncompetitive procedures unless they have provided advance notice of intent to award a sole-source contract, which invites bids or proposals from potential competitors, in the Commerce Business Daily (CBD). Senator Levin amended S. 338 in committee to strengthen this safeguard by precluding award on a sole-source basis unless (1) in the case of contracts over $25,000, the agency considers any bid or proposal received from potential competitors in response to the CBD notice, and (2) for contracts over $100,000, the use of noncompetitive procedures is approved either by the head of the procuring activity (HPA) or his/her designee, provided it is someone at a level higher than the contracting officer (CO).[75] The Levin amendment is intended to ensure that the notice of noncompetitive contracts receives meaningful consideration by the procuring agency and to bring greater accountability to the decision to use noncompetitive procedures. Although the amendment allows for delegation of review authority from the HPA to a level higher than the CO, the committee intends that the designated person should be as high in the chain of command for the procurement decisions as is reasonably possible.[76]

E. Incorporate the Evaluation and Award Procedures from the Present Statutes

Within the new statutory framework established by S. 338, the evaluation and award procedures for sealed bids and competitive proposals are the same as those currently required in the ASPA and the FPASA for formal advertising and negotiation. S. 338 requires sealed bids to be opened publicly at the time and place specified in the solicitation, and to be evaluated without discussions with the bidders. In accordance with present procedures, contracts are to be awarded to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the government, price and other factors considered. 10 U.S.C. §2305; 41 U.S.C. §253. "Other factors," in the case of sealed bids, include (1) foreseeable costs or delays to the government resulting from difference in inspection, location of supplies, and transportation, (2) local, state, and federal taxes, and (3) other price-related factors. DAR 2–407.5; FPR 2–2.407.5.

Competitive proposal procedures for evaluation and award are necessarily less structured. S. 338 establishes a general framework for the conduct of competitive negotiation. Executive agencies are permitted to discuss their requirements or the terms and conditions of the proposed contract with offerors after receipt of proposals but prior to award of the contract. S. 338 adopts and extends the ASPA provision, which requires that military agencies conduct written or oral discussions with all responsible offerors in the competitive range to apply to civilian procurements as well. 10 U.S.C. §2304(g). The "competitive range" is to be determined by the contracting officer based on price, technical, and other salient factors (not necessarily related to price) and is to include all proposals which have a reasonable chance of being selected for award.

After written or oral discussions have been conducted with all offerors within the competitive range, agencies are required to solicit "best and final offers." Once discussions are held and best and final offers are received, agencies are not permitted to conduct further discussion beyond minor clarifications, unless it is in the government's interest to reopen discussions and solicit another round of best and final offers.[77] This authority provided in S. 338 is not to be construed, however, to permit

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[74] The procedures prescribed for awarding noncompetitive contracts based on unsolicited proposals are adopted from a draft GSA amendment to the Federal Procurement Regulations.

[75] Supra note 6.

[76] In many of the large civilian procurement activities, such as the Federal Aviation Administration, contracts over $25,000 which are to be negotiated noncompetitively are presently reviewed by the HPA. For the larger defense procurement activities, however, where noncompetitively negotiated contracts over $100,000 in fiscal 1981 totaled nearly 700 in one case, such a review, is not feasible. Therefore, S. 338 allows for the delegation of review authority from the HPA.

[77] The comptroller general has held it proper to reopen discussions and solicit another round of best and final offers (BAFOs) under the following circumstances: (1) substantial questions re-

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"auctioneering" through the random reopening of discussions and soliciting of multiple best and final offers for any contract. Auction techniques, such as indicating to an offeror a price which must be met to obtain further consideration or informing the offeror that his or her price is not low in relation to another offeror, are strictly prohibited. Multiple best and final offers, in these cases, serve to undermine the competitive negotiation process.

F. Set a Uniform Threshold for Certification of Cost or Pricing Data

Prior to the award of any negotiated defense contract, subcontract, or modification to such contracts and subcontracts which exceeds $500,000, contractors are required to submit cost of pricing data and certify that the data provided are "accurate, complete, and current." 10 U.S.C. § 2306(f). The Federal Procurement Regulations require certification of cost or pricing data for civilian negotiated contracts over $100,000. FPR 1–3.807. The purpose of this "truth-in-negotiations" provision is to provide the basis for retroactive price adjustment, in the event that data submitted prior to award were not accurate, complete, and current, without costly litigation to establish intent. As introduced, S. 338 extended the statutory requirement for certified cost or pricing data in the ASPA to cover civilian procurements under FPASA, thereby establishing a uniform threshold in both statutes at $500,000.

The Truth in Negotiations Act, as it was originally enacted in 1962, set the dollar threshold at $100,000. In 1981, this threshold was raised to $500,000 by the House Armed Services Committee during its consideration of the fiscal 1982 DoD Authorization Act, with the Senate Armed Services Committee concurring in conference. The rationale for raising the threshold for certified cost or pricing data was to accommodate inflation and to lessen the burden on contractors. The GAO opposed this increase in the threshold for defense contracts, as well as the increase included in S. 338 for civilian contracts.[78] While contractors may still be required to provide cost or pricing data for negotiated contracts under $500,000 for pre-award audit purposes, GAO argues that, without certification, agencies lack the legal ammunition to deter defective pricing.[79] For this reason, the committee at its March 17 markup adopted an amendment offered by Senator Levin which establishes a uniform threshold of $100,000 for requiring certified cost or pricing data prior to award of all contracts using other than sealed bid procedures. The committee is concerned by the lack of post-award audits on negotiated contracts under $500,000 and encourages the Department of Defense to devote more audit resources to these contracts.[80]

G. Require Agencies to Publicize All Prospective Contracts

The committee strongly believes that all contractors should have the opportunity to compete for a government contract, while only those capable of meeting the government's need should be considered for award. The procurement notice provision in S. 338, which requires agencies to publish notice of prospective competitive and noncompetitive contracts over $10,000 in the Commerce Business Daily, is an integral part of the affirmative effort required of all agencies to obtain effective competition.[81]

The notice provision in S. 338 remedies two problems with the CBD requirement in present law which Senator Levin, who introduced legislation last Congress requiring presolicitation notice, discussed at the June 29, 1982 hearing:

> The only way companies can compete is if they know about a contract and in many cases the Commerce Business Daily is the only way for small companies to become aware of government contracts . . . [Witnesses have] testified that the contract descriptions [in the CBD] were frequently insufficient, and

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quiring discussions are raised by one of the BAFOs, (2) previously existing ambiguities are not discovered until after submission of BAFOs, (3) additional technical information is needed to evaluate the proposals, (4) government estimates are found to be in error, or (5) government requirements change.

[78] GAO letter report to Senator Carl Levin, B–210718, PLRD, March 8, 1983.

[79] It is important to realize that the determination of the need for auditing proposals is independent of the statutory threshold for providing certified cost or pricing data.

[80] In its letter report, the GAO states that "field reviews or audits of proposals in the $100,000 to $500,000 range have resulted in considerable savings—many times more than the cost of resources to achieve the savings." Data provided by the Defense Contract Audit Agency for fiscal 1980 show a net savings of $173.9 million from audits of 13,258 proposals in the $100,000 to $500,000 range.

[81] The CBD procurement notice provision in S. 338 reflects a compromise between the notice provisions in S. 338, as originally introduced, and S. 272. a Senate Small Business Committee bill which passed the Senate, with my amendments, on February 3. While the objectives were the same, the original version of S. 272 and the corresponding sections of S. 338 differed in several respects. The amendments which were incorporated into S. 272 were subsequently adopted by the Oversight Subcommittee for S. 338 to remedy those differences.

that the period of time for competitive responses was too short. In other words, by the time they received the Commerce Business Daily, read it, and prepared a response, the contract had already been awarded.[82]

S. 338 codifies the time periods for publication provided by regulation. DAR 1–1003.2; FPR 1–1.1003–6. To ensure compliance, agencies are prohibited from (1) issuing a solicitation unless the agency has published a notice of such solicitation in the CBD for fifteen days (an increase of five days over the present regulatory requirement) and (2) establishing a deadline for the submission of bids or proposals any earlier than thirty days after the solicitation was issued. The presolicitation notice gives contractors the time to review the CBD for contract opportunities and request solicitation packages from the procuring agencies, and it also provides contractors an equal footing from which to begin to prepare their bids or proposals. With this additional time, contractors are better able to utilize the full thirty days from the time solicitation packages are distributed until competition is foreclosed to prepare their submissions.[83]

Notices which provide incomplete or inaccurate information detract from the utility of the CBD. S. 338 specifies the information which a proper notice should include: a description of the property or service needed by the agency, the name and address of the agency official who may be contacted for the purpose of obtaining a copy of the solicitation, and a statement that any person may submit a bid, proposal, or quotation which shall be considered by the agency. For noncompetitive procurements, the pre-award notice should include, in addition to this information, the justification for going sole source and the identification of the intended source. Presently, pre-award sole-source notices are published—if published at all—primarily for informational purposes, such as alerting small businesses to subcontracting opportunities, and strongly discourage proposals for the prime contract.[84]

Under the solicitation provision of S. 338, agencies are not explicitly required to issue solicitation packages to all contractors responding to a pre-award notice. The committee does not, however, intend to grant agencies the authority to deny packages arbitrarily. The purpose of the pre-award notice is to open competition to all offerors who can meet the agency's needs. To serve this purpose, solicitation packages should be available upon request. In situations where competition is not anticipated and solicitation packages are therefore not prepared, as is often the case with contract modifications and extensions, the committee intends that agencies shall provide potential competitors with solicitation packages or comparable information.[85]

Exceptions are provided to the CBD advance notice requirement which are separate but identical in almost all cases to the exceptions for noncompetitive procedures. The first exception to competitive procedures, which permits agencies to use noncompetitive procedures when only one source is available and there are no competitive alternatives, is not included in the exceptions to the advance notice requirement. In this situation, the notice is used to flush the marketplace for potential competitors. Exceptions two through six for noncompetitive procedures apply to the advance notice requirement. During the committee markup, I offered a technical amendment to S. 338 which addressed a concern raised by the intelligence community that the exception for classified procurements was too restrictive. Under S. 338 as introduced, an agency would have been required to publicize notice of those classified procurements which could be worded without disclosing classified information. In some cases, however, the mere disclosure of the agency's need could pose security

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[82] Statement of Senator Carl Levin, supra note 35, Hearing Record at 8.

[83] S. 338 as originally introduced required agencies to publish notice of prospective competitive and noncompetitive contracts as early as practicable in the procurement process, but not later than thirty days before the date set for the receipt of bids or proposals. The fifteen-day presolicitation notice was added as part of the compromise with the Small Business Committee.

[84] Supra note 49 at 68.

[85] The issuance of requests for proposals (RFPs) is a tricky issue which the commission discussed in its report: "Several agencies now interpret the statute to permit limiting the initial issuance of RFPs to a reasonable number of firms deemed most competent. Others are reluctant to follow this practice. They believe a blanket issuance of the RFP and the evaluation of all proposals is easier, safer, and possibly less costly than attempting to justify a limited solicitation. . . . We recommend retaining the statute which requires public announcement of procurements (15 U.S.C. 637(e)) and adding to it a requirement that agencies honor all reasonable requests for uninvited offers to compete," supra note 3 at 23.

problems. My amendment exempts from the notice requirement those procurements in which disclosure of the agency's need would compromise the national security.[86]

One additional exception to notice, not included as an exception to competitive procedures, is for those procurements in which the head of the procuring agency, with the concurrence of the administrator of the Small Business Administration, determines that advance notice is not appropriate or reasonable. This exception to notice, which is included in present law, has been used only once during the past ten years involving a Justice Department contract to transfer prisoners.[87]

S. 338 also requires agencies to publish a post-award notice in the CBD for all contracts over $10,000 which are likely to result in the award of subcontracts, unless disclosure of the contract would compromise national security. This post-award notice would serve to alert small businesses to potential subcontract opportunities. Although agencies are not required to provide pre-award notice of prospective noncompetitive contracts under S. 338, they are not prohibited from doing so if they want to obtain competition for subcontracts which will be settled before the prime contract is awarded.

H. Establish an Advocate for Competition

Present regulations require contracting officers (COs) to maximize competition for each contract award. GAO found, however, that COs often acquiesce to the sole-source procurement requests of headquarters, technical personnel, and end-users.[88] In effect, there is no clear responsibility and accountability for competition in government contracting.

During the committee markup of S. 2127 last Congress, Senator Pryor amended the bill to establish an advocate for competition in each procuring agency to promote the use of competitive contracting procedures, a proposal he originally introduced in December 1981. The advocate's primary responsibility will be to ensure proper implementation of the new operating procedures, which require that agencies make an affirmative effort to obtain competition. Specifically, the advocate will ensure that competition is not foreclosed by restrictive need statements, unnecessarily detailed specifications, poor procurement planning, or arbitrary agency action. The objective, in short, is to instill accountability into the procurement process.

This provision provides the heads of each executive agency the authority to designate an existing officer or employee as the advocate for competition. The advocate is to be relieved of all inconsistent duties and responsibilities and provided with the necessary staff and resources. Executive Order 12352, issued in March 1982, established the Procurement Executive position to oversee the development of procurement systems and to evaluate systems performance. The Procurement Executive could also serve as the competition advocate.[89]

I. Strengthen the Current Recording and Reporting Requirements

Under the Office of Federal Procurement Policy Act, the Federal Procurement Data Center was established within the General Services Administration to collect, develop, and disseminate procurement data. 41 U.S.C. § 405(d)(5). As the official federal procurement data base, the system is intended to provide a basis for reports to the president, the Congress, federal executive agencies, and the general public.

S. 338 facilitates congressional oversight by requiring agencies to establish and maintain a record, by fiscal year, of the procurements other than small purchases in which noncompetitive procedures are used. The information to be included in the record would designate the contractor who received the award, the property or services which were obtained, the dollar value, the reason for using noncompetitive procedures (pursuant to one of the six exceptions), and the position of the person in the contracting agency who required and approved the sole source award. These data would be transmitted to the Federal Procurement Data Center.

S. 338 also requires the advocate for competition in each procuring agency to issue an annual report to Congress on the agency's use of competition in contracting. Spe-

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[86] To avoid possible abuse of this exception, it may be worthwhile to require the intelligence agencies to issue an annual report to the House and Senate Intelligence Committees on the use of competition in the classified procurements.

[87] This last exception to the pre-award notice requirement, which was added to S. 338 as part of the compromise with the Small Business Committee, is to be used in only highly unusual procurement situations that have not been specifically exempted elsewhere.

[88] Supra note 58.

[89] Currently, forty-five agencies have appointed Procurement Executives. To facilitate agency implementation. an interagency task group has developed a model charter which identifies the appropriate placement of the Procurement Executive within an agency's organizational structure, sets out primary duties and responsibilities, and lists functions appropriate for delegation to subordinate procurement organizational heads and contracting officers.

cifically, the report will summarize the steps taken by the agencies to increase competitive contracting during the previous year and will recommend specific actions to be taken in the following year. The report is to be submitted to the Senate Committee on Governmental Affairs and the House Committee on Government Operations no later than September 30 of each year, for fiscal years 1983 through 1986.

J. Other Issues Considered by the Committee

In addition to the discussion of the primary provisions of the Competition in Contracting Act, several other issues concerning the implementation of S. 338 and the general distinction between contracts, grants and cooperative agreements were raised during the committee's consideration of S. 338.

1. Implementation

The Department of Defense recommended that the proposed amendments to the ASPA and the FPASA should be implemented first on a test basis before legislating government-wide. The amendments to the ASPA, according to William Long's testimony at the June 29, 1982, hearing, provide "a considerable change in time-honored procurement procedures."[90]

While S. 338 increases competition in contracting through greater flexibility and restricts the use of sole-source contracting, the committee does not consider S. 338 to represent a "considerable change," which could "disrupt the orderly processing of procurements" if not tested. Within the new statutory framework established by S. 338, the evaluation and award procedures for sealed bids and competitive proposals are the same as those currently required for formal advertising and negotiation. In this regard, no substantive regulatory modifications in evaluation and award procedures would be required for implementation of S. 338.

Considering the history of comptroller general and court decisions which have interpreted the present evaluation and award procedures, and, more significantly, the familiarity which results from over thirty years of experience, the committee feels that the present formal advertising and competitive negotiation procedures should be retained. The purpose served by substituting the new terms "sealed bid" and "competitive proposal" procedures for "formal advertising" and "negotiation" is to eliminate the competitive and noncompetitive connotations associated, respectively, with the present language.

Furthermore, the committee believes that the evidence of unnecessary sole-source contracting is so compelling that permanent reforms in the procurement statutes must be implemented. The committee found no evidence to suggest that a test period was either necessary or desirable, and believes that the six-month implementation period provided in S. 338 will be sufficient for a smooth transition.

2. The Use of Contracts vs. Grants or Cooperative Agreements

A tangential issue to competition in government contracting is the use of grants and cooperative agreements instead of contracts to circumvent the requirements of the procurement process. In some cases, agencies have awarded grants on a sole-source basis for services which should have been procured competitively under contract. In view of the increased effort required of agencies to obtain effective competition under S. 338, the committee is concerned that this practice could become more prevalent.

Congress enacted the Federal Grant and Cooperative Agreement Act of 1977 (41 U.S.C. §501 et seq.) to establish guidelines for the proper use of grants, cooperative agreements, and contracts. The act distinguishes between procurement and assistance relationships based on the "authorized federal purpose." If the government's purpose is to acquire property or services for its direct benefit or use, then a contractual agreement is appropriate. Grants or cooperative agreements are to be used, on the other hand, when the principal purpose of the relationship is to transfer money, property, or anything of value to a recipient to accomplish a public purpose of support or stimulation.

The act gives agencies considerable latitude in selecting the instrument to be used in a specific transaction. In fact, the GAO found that several of the assistance awards it sampled in 1981 should have been procured under contract, and recommended in a September 1981 report entitled Agencies Need Better Guidance For Choosing Among Contracts, Grants, and Cooperative Agreements (GGD81–88) that the OMB should revise its regulations to more precisely prescribe the conditions under which contracts, grants, and cooperative agreements are to be used. To date,

[90] Supra note 63 at 51.

however, the OMB has circulated revised regulations that has not issued anything final. The committee joins the GAO in recommending that the OMB revise and issue its regulations to preclude further circumvention of the competitive procurement process.

V. CONCLUSION

The Competition in Contracting Act builds on the existing statutes to enhance the use of competition in government contracting and to restrict sole-source procurement to only those cases where it is truly required. The Congressional Budget Office estimated that "significant" savings could be achieved through the effective implementation of S. 338. The CBO estimates that each 1 percent saved on new contract actions reduces costs by about $200 million per year. Since studies on the use of competitive contracting have concluded that potential savings range from 15 to 50 percent, a conservative estimate of the savings resulting from this bill would be well over $2 billion.[91]

While it is important to recognize that, in some cases, the Defense Department and civilian agencies cannot contract competitively, the committee found that agencies routinely award sole-source contracts for property and services when competition was available. I strongly believe that the Competition in Contracting Act sets forth a workable solution to the costly problem of excessive sole-source contracting.

Mr. CLINGER. Thank you very much, Mr. Black.

Now I am pleased to ask Mr. Young if you would give us your comments.

STATEMENT OF DAN YOUNG, PRESIDENT, FEDERAL DATA CORPORATION

Mr. YOUNG. Thank you, Chairman Clinger, distinguished Members of the combined committees. I am Dan Young, president of Federal Data Corporation, and I am particularly pleased to be here today and to share with you my views regarding H.R. 1670.

In general, we are very enthusiastic about most of the items in your bill. For example, we believe that the basic thrusts of Title II of the bill regarding commercial items is a vitally important and necessary advance. We also like what we see in Title IV of the bill regarding the streamlining of the dispute resolution, and from what I understand of the administration's proposed bill, we certainly prefer the provisions of 1670, and I can be more specific about that later.

The only area of the bill that I feel compelled to express any reservation about is the proposed substitution of maximum practicable competition for full and open competition which currently exists under the law.

Let me preface my comments with specific remarks by giving you some description of my company so that you can understand for yourselves the segment of the information technology business we represent.

Federal Data is a computer systems integrator headquarters in Mrs. Morella's district of Bethesda, MD. We have been in business for over 25 years. We have more than 170 employees, and over the years we have successfully performed on more than 1,000 firm fixed-price, competitively awarded contracts, almost all of which involve commercial off-the-shelf products and services.

Our approach has been to put a best-of-breed team together and to bid and deliver the most technically responsive solutions to in-

[91] Senate Governmental Affairs Committee report on "Competition in Contracting Act of 1983" (98–50), 98th Cong., 1st Sess., March 31, 1983, p. 38.

clude hardware, software, communications, technical services, and training.

We are a small business, particularly when compared with some of the companies here in the room today with whom we compete, and with whom, on other occasions, are our teaming partners. The Federal Government has been a wonderful customer for us by permitting us to compete with far larger companies and awarding us the work when we offer the best technical and cost-effective solutions. In recent years we have won the right to modernize such diverse agencies as the Veterans' Benefits Administration, the U.S. Department of State, the U.S. Navy Supply Systems Command, and certain functions of the Internal Revenue Service. And in each case and under each contract, we have performed as well, if not better, than larger, perhaps better known companies. We always believe that the best recommendations come from satisfied customers.

Let me now specifically address my sole concern about the bill, recognizing again how enthusiastic I am about the bill's basic objectives.

As a small business, we have found that full and open competition standard in the current law is quite useful. It has permitted the Government and the taxpayer to receive the best value from sources, like us, who otherwise might not have been permitted to bid.

The question is whether the proposed changes to maximum practicable competition, and in another section when a simplified procurement procedure is used, a standard known as competition to the extent practicable, whether these new standards will be used appropriately and consistently by agencies with respect to their needs and the interests of taxpayers.

Under the existing law, the Government already has considerable latitude in controlling the numbers and qualifications of bidders. And I would also add, there are substantial economic considerations regarding the expenditure of bid proposal costs that also go to limit the number of bidders that are pursuing a specific opportunity. If the proposed change is made, it will presumably authorize and permit even greater degrees of restriction to competition. It is unclear to me what form these restrictions might take.

Further, we are not at all sure which problem this provision is intended to solve, for the current regulations grant the agencies the authority to eliminate from further consideration any offeror who, for technical or pricing reasons, has failed to meet the standards of the competitive range as established by the contracting officer.

I personally have little doubt that with my own company's track record of success—it is unlikely that we will be unwelcome to participate in future procurements even if the new standards are adopted. But I am concerned that some agencies will use the proposed changes at some future date as a weapon to exclude all but the largest companies from procurements. I think that such a result would be detrimental to the Government and to the taxpayers, and it would lead to less innovation and higher prices.

Notwithstanding these issues, Mr. Chairman, we are most supportive of your efforts and ask only that you will bear these simple thoughts in mind as you consider your bill.

Thank you very much for the opportunity to speak to you.
[The prepared statement of Mr. Young follows:]

PREPARED STATEMENT OF DAN YOUNG, PRESIDENT, FEDERAL DATA CORPORATION

Chairman Clinger, Chairman Spence, and other distinguished Members of your Committees, I am Dan Young, President of Federal Data Corporation and I am particularly pleased to be here and share my views with you concerning H.R. 1670. In general, we are very enthusiastic about most of the items in your bill. For example, we believe Title II of your bill, the commercial items provisions, is a vitally important and necessary advance. We also like what we see in Title IV of the bill regarding streamlining of dispute resolution, and prefer this proposal to the alternative approach suggested in the Administration's bill. The only area of the bill I feel compelled to express any reservation about is the proposed substitution of "maximum practicable competition" for the term "full and open competition" which currently exists in law.

Let me preface these specific remarks by giving you a brief description of my company, so you can judge for yourselves the segment of the information technology business we represent. Federal Data is a computer systems integrator, headquartered in Mrs. Morella's district in Bethesda, Maryland. We have been in business for over 25 years, employ 170 employees, and over the years have successfully performed on more than 1,000 firm fixed-price, competitively awarded federal contracts. Our approach has been to put a "best of breed" team together that permits us to bid and deliver the most technically responsive solutions to include hardware, software, communications, technical services and training.

We are a small business, particularly when compared with some of the companies here in the room today with whom we compete, and whom, on other occasions, are our teaming partners. The federal government has been a wonderful customer for us, by permitting us to compete with far larger companies and awarding us the work when we offer the best technical and cost-effective solutions. In recent years we have won the right to help modernize such diverse agencies as the Veteran's Benefits Administration, the U.S. Department of State, the U.S. Navy Supply Systems Command, and certain functions of the Internal Revenue Service. In each case we have performed as well, if not better, than larger, better known companies.

Let me now specifically address my sole concern about the bill, recognizing again how enthusiastic I am about the bill's basic objectives.

As a small business, we have found the "full and open competition" standard in current law quite useful. It has permitted the taxpayer to receive the best value from sources, like us, who otherwise might not have been permitted to bid.

The question is whether the proposed changes to "maximum practicable competition" and, when using simplified procedures, "competition to the extent practicable" will be used appropriately and consistently with agency needs and the interests of the taxpayers.

Under existing law, the government already has considerable latitude in controlling the numbers and qualifications of bidders. If the proposed change is made, it will presumably authorize and permit even greater degrees of restriction to competition. It is unclear to us as to what form these restrictions might take. Further, we are not sure which problem this provision is intended to solve, for the current regulations grant agencies the authority to eliminate from further consideration any offeror who, for technical or pricing reasons, has failed to meet the standards of the competitive range as established by the contracting officer.

I have little doubt that with my own company's track record of success, it is unlikely that we will be unwelcome to participate in any future procurement if the new standards of competition are adopted. But I am concerned that agencies will use the proposed changes at some future date as a weapon to exclude all but the largest companies from some procurements. I think that such a result would be detrimental to the taxpayers and lead to less innovation and higher prices.

Notwithstanding these issues, we are most supportive of your efforts and ask only that you will bear these simple thoughts in mind as you consider the bill.

Thank you.

Mr. CLINGER. Thank you very much Mr. Young.
Now we will ask Mr. Phillips for his statement.

STATEMENT OF STERLING PHILLIPS, EXECUTIVE VICE PRESIDENT AND CHIEF OPERATING OFFICER, TRI-COR INDUSTRIES, INC.

Mr. PHILLIPS. Thank you. Chairman Clinger and members of the committees, I appreciate this opportunity to testify regarding the Federal Acquisition Reform Act of 1995.

My name is Sterling Phillips and I am the chief operating officer of TRI-COR Industries, a 350-employee, minority-owned information technology services firm. Our company participated in the Federal 8(a) program until a year ago. I am pleased to report that TRI-COR is one of the success stories of the 8(a) program and is today a well-established company with a bright future.

I am here today because our business is predominantly in Federal contracts and I share your sense of urgency to streamline the cumbersome and costly acquisition process. This is an issue every bit as important to industry as it is to Government.

To illustrate: our firm is currently bidding on a Federal contract with a value between one and $2 million. The competitive acquisition is predominantly commercial computers and software products with a modest amount of professional services to install, tailor, and support the system. We have just reached the 1-year anniversary since the request for proposal was released. Our projection is that the contract will be awarded in August or September, assuming there is no protest.

This is typical of the timeframes we encounter in the Federal market, and I have every confidence in this case that the civil servants running their procurement are moving as fast as the current hodgepodge of rules, regulations, tools, and expectations will allow. I shudder to think what the Government and the contracting community have to spend to deal with this acquisition.

By comparison, I have a single employee in the Midwest who has submitted almost 10 commercial proposals in the past 60 days. Each of these proposals is greater in value than the Federal example I cited and all will award within another 60 days.

As a business manager, taxpayer, and father of five future taxpayers, I do not believe we can tolerate this archaic approach to Federal acquisition. It is imperative that we give Government employees the kind of efficient, streamlined acquisition authority routinely used by their counterparts in businesses of all sizes. I support H.R. 1670 because I view it as a major, positive step in that direction.

I would like to address two aspects of the proposed legislation. The first is the proposed shift from "full and open" to "maximum practicable" competition. In principle, I support this change. As with most legislation, however, the big question is how this approach will be implemented. The bill provides for selection of a maximum number of "responsible or verified" contractors to bid on a procurement without being specific as to how the eligibility, and number, of those contractors will be satisfied.

As a small business, we need an open process that allows me to earn the right to bid, even though my company many not be a household name. We don't object to qualification criteria based on the quality of our work, past performance, or our cost competitive-

ness. We would object, however, to being excluded simply because we are not known to a particular agency or procurement official.

There are many small businesses today that will be the MicroSoft or EDS of tomorrow. It is in the Government's best interest that these small firms be allowed access to prove themselves as worthy competitors to serve the Federal customer. I encourage to committees to ensure that the reform process does not result in an oligarchy of well-established firms being the only bidders on Government procurements.

This does not suggest that uncompetitive bidders should be allowed to enter, or remain in, the bidding process. If we cannot win a bid, you do us a favor to let us know that at the earliest possible date. We have had the experience of participating in a procurement for nearly 2 years before losing. When we were debriefed, technical weaknesses were cited that made it apparent that the customer did not view us as a potential winner from the outset. We wasted 12 to 18 months of money and effort in a losing cause. Our interests, and those of the taxpayer, would have been served much better by telling us early in the cycle that our solution, or our company, was simply not qualified to win.

When we compete for business, we know that we will sometimes lose. Our goal, and it should be yours, is to invest as little as possible in a losing bid. This bill has the potential to save Government and industry, large and small, enormous sums of money on acquisition costs.

My second comment with regard to the bill is in support of the changes in required certifications. Voluminous certifications are a significant cost burden to Federal suppliers. They raise our costs of doing business with the Government by an estimated 18 to 20 percent over comparable commercial practices. The taxpayer suffers in two ways because of this. First, our prices must be higher. Second, there are many competent firms who simply refuse to do business with the Government because of this burden. I applaud the changes in this bill that greatly simplify the paperwork burden associated with being a Federal contractor.

In conclusion, I urge your support and speedy passage of H.R. 1670. Thank you for your time and attention.

Mr. CLINGER. Thank you very much. I thank the panel, all of you, for your contributions this morning. I have a couple of questions.

Obviously one of the efforts of this legislation is to encourage more qualified participation, not less. That is our objective, to increase the number of qualified competitors, because it has been our observation that that has been shrinking, that too often we have fewer and fewer people participating because of the enormous difficulties that they encounter, whether it is the certifications, whether it is the paperwork, whether it is the enormous difficulty in being a player, so that we have seen rather than having more competition we are having less.

Mr. Black, you indicated that we didn't need to redefine or go to a different standard for competition. We didn't need to go away from the full and open competition standard because there is a procedure now by which that unqualified bidders can be ruled out. But Mr. Phillips says that that doesn't happen in a timely fashion, that

you have to go through a fairly long vetting process during which you are spending resources and time before being told you never were in the ball game. What we are trying to do is prevent things where we have enormous spinning of wheels to no great purpose.

Mr. BLACK. I think I would respond, Mr. Chairman, that fundamentally I am inclined to want to trust the companies in the private sector to make business decisions on what they want to attempt to pursue. They know those costs, they know the risks.

Certainly some guidance out of the executive branch of the framework they are seeking, and good descriptions of a project should be able to signal to many companies: this is maybe something I won't be very able to handle. There are business decisions here. Companies bid for private contracts and try to make deals all the time and there are risks in doing business.

There are certainly, as we have indicated, some things that are positive: in terms of seeking commercial data and trying to get rid of cost and pricing data. There are problem elements that need to be reformed in the system. We think, however, many have been addressed in FASA I. It has not been implemented. It is not the law now.

Part of our concern is we have just seen draft regulations on FASA I. We believe that many of the difficulties that we acknowledge, and we have enjoyed trying to solve those problems together, have been addressed in a reasonable way. It makes sense to let some of those solutions play out. I think vigorous oversight by this committee would be called for in how that is done. We are not at all sure that many of the concerns that are very real and did exist have been adequately addressed. We don't think all have. But we would like to have a better handle on what they are.

Mr. CLINGER. I can assure you that this committee is going to exercise very vigorous oversight over implementation of FASA I. We pledged to do that from the very beginning because we recognize that the devil is in the details and that we can pass statutes here but unless the regulators actually implement those effectively, then it is all for naught. We are going to do that.

I think there is a general sense on the committee that we were unable to go as far as we wanted to go last year and this effort is to basically build on what we accomplished last year and eliminate some of the things that we were not able to eliminate in the previous effort.

Mr. Young, your statement also focused on the fact that there is an ability now to limit competition, to rule them out up front. I am wondering if that really is an effective device if it is really utilized. Our sense is that that is not something often done; in other words, that bureaucracy being bureaucracy is reluctant to rule somebody out on their own say so, they are much more likely to let the thing play out at great cost to the unlucky or the unsuccessful bidders.

Mr. YOUNG. We have seen it both ways where agencies who are fundamentally well run and have a central procuring activity tend to communicate better early on to let bidders know where they stand. I don't think you can address any of these issues in a vacuum, and this more open communication among bidders and procuring agencies is a vital part of ascertaining where you stand in the procurement process.

If we want to move toward a more commercial-like environment, clearly that is one of the important things; because it is insane to place a set of rules where a buyer and seller are unable to speak directly and, frankly, with each other during the procurement process. As a businessman, if I am told by an agency or if I have the drift from questions that they ask me that my proposal is inadequate in some fashion, my first reaction will be to get my marketing people together again and say, tell me again about this winning strategy that you have because I don't want to spend any more money on it, so better communication with the agencies during the procurement process is essential.

I am also fascinated with the idea of having some standard of past performance as a consideration that the vendor can be told, "your work in the past has not been adequate to meet this new requirement and we would like to discuss that with you." "How do you plan to go about this?" "We will give you an opportunity to explain it." I think there are ways to deal with it. It is not a lost issue. But there are techniques today. They just need to be loosened up a bit.

Mr. CLINGER. My time has expired.

I am pleased to recognize the gentlelady from New York, Mrs. Maloney.

Mrs. MALONEY. Thank you. There is a great deal that I support in this bill that I think is important to streamlining Government and making it more responsive to the taxpayers and the contractors. I am very concerned about the changing of the definition in full and open competition to that of, what was it called, maximum practicable.

The point that you raise that some people are not competing—I certainly don't think it is because of a definition that says full and open competition. It may be because there is too much paperwork or the certification or maybe we should have one form that you fill out that you go forward with, but to exclude people from the beginning I think would be a tremendous mistake.

Mr. Black, in your testimony you said that the law now provided for a prequalification system. Could you define what that prequalification system is now?

Mr. BLACK. I am not sure whether I used prequalification. There are several ways in which there are standards that can be set forth that—actually, I think Mr. Cooper on the previous panel gave a definition which I should read. He gave it as a definition of maximum practicable, but that is the current law under CICA, that the agencies do have the ability to have various types of qualifications which screen people out.

It will depend on the agency and the type of bid, so it is not a simple standard to describe, but it does not mean that everybody can stay until the bitter end and go all the way no matter what. It is not the case. That is a strawman.

Mrs. MALONEY. One compromise might be that within 1 week or 2 weeks, you could meet with a contracting officer and they could indicate to the private sector that they don't believe they have the qualifications. If a contractor then makes the decision to proceed, that he thinks he or she can make a case, then let them proceed. But it seems to me that we might be shutting the door to the possi-

bility of saving taxpayer dollars and coming forth with new technologies.

I would like to ask Mr. Young and Mr. Phillips to explain in more detail how the concept of full and open competition—you mentioned, both of you in your testimony, that it was very important for the ability of small businesses to compete for Federal contracts. Is it your belief that if they have contracting officers deciding who meets prequalification standards, that only large companies will be able to compete? Would you elaborate on that.

Mr. PHILLIPS. That is an area of concern. The bill does not define in detail, and that I presume would be done by the regulators, exactly how potential bidders would be screened and selected for the list of those that are verified and responsible. We certainly would like that to be a merit-based, competitive kind of selection to allow us to qualify based on the quality of our work and our cost competitiveness. We would hope that that would not result simply in the largest or best known firms being the only ones who made it on to that list.

Mrs. MALONEY. In the first panel, I asked them to submit their definition of how one would proceed with a prequalification list and I would like to invite all three panelists to likewise submit to the record how you would define how maximum practicable should operate to create the "beneficial list" that will allow someone to compete on roughly $200 billion in Federal dollars of private contracts.

Mr. BLACK. If I could respond, I think the difference in definition between full and open and maximum practicable, to make a metaphor I haven't thought out, would be to be criminal law saying thou shalt not do *X* versus thou shalt try not to do *X*.

We want full and open. That is the standard. We can set all kinds of procedures and checks to get rid of people who are not qualified, but why change the goal? The goal is to follow the law. The goal is to maximize competition. Keep the goal there in the law.

Our concern is that we do not know what maximum practicable is. To the extent we have some sense of that definition, it comes from history. We had many years when that was in fact the practice in the Government through the 1970's into the early 1980's.

Mrs. MALONEY. No definition; it is the back room contract, right, the old boy network. You are qualified, you are not.

Mr. BLACK. Congress with extensive hearings and bipartisan support passed CICA because they found such terrible practices that went on for years of inside wheeling and dealing.

Mrs. MALONEY. You did testify that you thought the current definition of maximum practicable would create lawsuits. Would you like to elaborate?

Mr. BLACK. We have had over a decade of experience with the concept of full and open. Whenever we create a new major standard underpinning a system, people need to test the boundaries of what that is. We have a substantial body of case law for full and open. If we have a new standard, people are going to test what it means and people will have to go back in many suits to find out: does it mean this? Does it mean that?

The legislation, I am afraid, does not provide much guidance. It puts great faith in the executive branch to come up with definitions

and criteria and we do not share the same comfort in giving that much discretion to the executive branch.

Mrs. MALONEY. My time is up.

Mr. CLINGER. You have a lot of comfort in us, I take it.

Mr. BLACK. Definitely more so, Mr. Chairman.

Mr. CLINGER. I am not sure how well placed that is. I am pleased to recognize Chairman Horn.

Mr. HORN. Thank you very much, Mr. Chairman. I found each of your ideas and testimony very pertinent and right to the point. I think you see that the minority and the majority represented here in the room are very sympathetic with how we make sure we can get new firms with creative ideas to get into an established process, where we perhaps feel a little too comfortable working together and going back to the same old group. Not that they don't do a fine job, but I think we need your help to make this a viable process without making it some huge paper machine that all of us are trying to get away from.

I am impressed by the comments that Mr. Cooper made on the first panel when he said our outcome should be to have a maximum number of practicable winners. In getting to that, where do we place the burden? Do we place it on the procurement officer or the potential firms. I think we have had very good testimony on the current extensive process required.

It was pointed out by my colleague, Mr. Davis, a very able member of this committee, that you would practically have to go through every procurement officer that might potentially have a handle in the decision or those above him and get a sworn statement that I haven't told any of the firms or the firm you represent in particular something that gives them any edge in violation of the law.

It seems to me we have to think about where that burden should be placed and perhaps it ought to be placed on the bureaucracy. Let's deal with them as public servants rather than having everybody else who is trying to get in and to earn a living having to fill out all these pieces of paper. Maybe you fill out one piece of paper that says I have abided by all these laws. As you see, we have sometimes increased the complexity of this.

As I listen to you and listened to the first panel, it seems to me one of the keys to solving these problems is the alternative resolution of disputes where we get a rapid answer and we don't have one firm able to tie the whole process in knots, delay both the Government's need for procurement and all of the rest of the competitors' need for a decision. So I think we would welcome your help in some fair way that we can do this.

I feel very strongly that unless it is off-the-shelf procurement which ought to be obvious, you just test it, does it meet what you need to have met, I feel that perhaps some verification is in order and then it depends on what do we mean by verification—that they have done past work successfully or unsuccessfully? That seems to me ought to be one key in verification. Then if certain scientific requirements are needed and certain types of talent are needed to achieve the goal, that ought to be known up front.

On the other hand, I have a case in Southern California where the person who has the contract went, shall we say, off the frame,

to use that trite phrase, thought up a completely new approach to it and there is a worry—and he is doing the job and the Defense Department or at least one part of it is very happy with that job and yet some of the more established Government laboratories or established private vendors would love to get the business back in their traditional way.

He has outthought them. He has outperformed them, and of course he gets a little static from other portions of the defense establishment who would like business as usual. So that is a case we will be working through. But it is an example of where things can go wrong.

Let me ask you, since we have been told that the lack of direct and timely communication between the agencies and the vendors result in a lot of problems, could you describe how the lack of communication occurs and how it affects businesses such as yours? Do you have any examples based on your own experience about this failure to communicate?

Mr. BLACK. I believe, Congressman, there is certainly probably broad consensus among this panel and the last one that there is a lot that could be done to improve communication. One thing I point to is understanding better the reasons for decisions. Some sunshine into that process is very valuable.

If they really understood why they were not chosen, that becomes tremendously valuable for future decisionmaking. That is missing and I think it would help, and I think that it gets to some of the problems that have spawned a desire for change in this area. So, yes, that is a big instance where having better communication in this case from the agency out to the private sector would be extremely valuable.

One comment on your definition of alternative dispute resolution. We think there is a lot of positive merit there, but it is why we are nervous if you change the fundamental standard, because if you challenge: whether formal or alternative, what are you measuring? If you are measuring against full and open, we know basically what that means. If you use a new standard, maximum practicable, we are not sure what it means and we are afraid that definitions of it will frankly not let it be something that anyone can be held accountable to very easily.

Mr. PHILLIPS. If I may comment, we are involved. We were selected for award of a contract which was immediately protested. This RFP which stated the requirements for this contract was issued April 1994. So we are well over a year since then. Throughout this procurement cycle, and to this day pending resolution of protest, the Federal customer is unable to work with us or communicate with us in any way about the manner in which these requirements may have changed in the ensuing year.

This contract becomes effective August 1. We are having to invest, we are having to begin transition work making certain assumptions on our part in an attempt to prepare but neither our interest nor those of the Government are necessarily well served by, in essence, flying blind and looking at written requirements that are over a year old and having to base your business plans on the assumption those requirements are still exactly as represented.

Mr. YOUNG. I would add that there are really two periods of communications that we are talking about here. One is pre-award and one is post-award. In the pre-award area of communications, it would seem to us to make sense that an agency and prospective vendors should be able to meet together and talk about the requirements and what the contractor can offer.

This communication is currently prohibited, and well in advance, perhaps even years in advance, of the contract award. Our technology is changing every 18 months, and so what was identified as a requirement early-on changes perhaps twice during the process. The post-award can be resolved in many respects by the ADR approach.

We are supportive of that and, frankly, I think consideration ought to be given as far as protests are concerned to require the losing protester to pay the legal expenses of the other protesters. I think that that would reduce a lot of spurious litigation.

Mr. CLINGER. The gentleman's time has expired. One further question of the panel. In Title II of our bill, we would remove the acquisition of commercial items from the specific Government data and audit requirements such as TINA. It also would provide for the use of simplified procedures for commercial acquisitions.

Do you think that these provisions will have what we hope would be the effect of encouraging more commercial firms to enter the Government if they have been discouraged because of the massive amount of nitpicking regulations that have been imposed on them by auditing requirements? Would these provisions have a significant impact on your firm's costs of doing business with the Government?

Mr. PHILLIPS. If I may, I believe it would have the effect of drawing more companies into the Federal market. There are many very formidable obstacles today for commercial firms to become effective marketeers to the Federal Government. The acquisition process and all that it entails is one of the biggest hurdles.

The potential to have to restructure the way you keep the books of your business, you have to increase your legal expenses in order to provide the certifications in order to comply with provisions are a major part of that. That doesn't mean that everyone will want, of course, to participate with the other unavoidable bureaucracy of being a Federal contractor, but those are some of the most onerous provisions, especially for small firms.

Mr. YOUNG. I think it is a great idea, Mr. Chairman. I think it will attract more people to the Federal market. I think it is going to have the result that you intended. My only concern about it is an ancillary concern to the issue of competition and there the definition of competition seems to be even more open. That is to the extent practicable.

I am not sure what that means and I am not quite sure what pricing would be based upon because in the commercial market, many products are not sold at list price, and, therefore, there has to be a technique by which an agency would at least test the validity of a price under which it procures.

Mrs. MALONEY. Mr. Black, you were saying that what would help is if they debriefed you and told you why you didn't get the con-

tract, could you tell me what is the procedure now? If you don't win, is there any statement, nothing is in writing; what happens?

Mr. YOUNG. It varies from agency to agency. Some agencies, particularly what is called in our business central, select activities are usually pretty good about explaining why you lost. Some agencies will not tell you anything and that has been the cause of numerous protests over the years where a company simply is stonewalled after spending millions of dollars and not told why they lost.

Mrs. MALONEY. Maybe we should in this legislation require a paragraph at least of explanation of why someone was not selected or uniform procedures of responses from the Government on why people were not selected.

Mr. YOUNG. There should be a full debriefing.

Mrs. MALONEY. It is now part of FASA, I am told. It has not been implemented.

One of the things in your testimony, Mr. Black, that I thought was very good, is you talked about how the protest was a private sector enforcement on integrity because if one could protest, they could point out if they felt things were incorrect and that it had become case law is very important. Yet other testimony has indicated that the protest system is very cumbersome and difficult.

Would it work if we just put a time limit that you could have only 2 weeks to protest and a decision had to be made by a board, period, so that you couldn't be tied up with all these reviews.

Mr. BLACK. There are significant time schedules that exist. Some reference to 17-year procurements are not bid protest system problems. The bid protest system has some very strict time lines. I was surprised by some of the statements to the regard to cost. I think I might go back to private law practice if you make $100,000 a day on a bid protest.

It is the process of bid protest we think can be refined. There were improvements and I think the consolidation in the bill is an excellent improvement. But given the system itself, you are going to have half the people who use it unhappy all the time. So you are always hearing criticism. Remember, you have a loser and a winner every time and you will hear losers who don't like it. Sometimes they will have won and sometimes they will have lost. Some of the criticism comes from people who may well have deserved to lose. The system has a lot of defenders.

Mrs. MALONEY. I want to be associated with some of the comments of my colleague, Chairman Horn, when he indicated that he felt like we needed to review aspects of this, learn more and, hopefully, we will have more hearings on this, Mr. Chairman.

Thank you.

Mr. CLINGER. Any further questions?

Mr. Horn.

Mr. HORN. No thank you, Mr. Chairman.

Mr. CLINGER. Gentlemen, thank you for your patience and for your very excellent testimony.

Mr. CLINGER. The administration is represented today by not only Washington executives but also by frontline acquisition professionals from out in the field. We are pleased to have with us this afternoon, Ms. Elizabeth Salih, contracting officer with General Services Administration, Fort Worth, TX; and Col. John Case, U.S.

Air Force, a program director at Maxwell Air Force Base in Alabama.

And we are delighted to hear from Hon. Steven Kelman who is the excellent administrator for procurement policy at OMB.

And finally we will have Capt. Barry Cohen, who is the Deputy to the Deputy Secretary for Acquisition and Reform at the Department of Defense with us today, who will not present oral testimony, but is available for questions.

[Witnesses sworn.]

STATEMENT OF ELIZABETH SALIH, CONTRACTING OFFICER, GENERAL SERVICES ADMINISTRATION, FORT WORTH, TX

Ms. SALIH. Chairman Clinger, Chairman Spence, and Members of both committees, it is a pleasure for me to be speaking before such a distinguished body. I am a little nervous and a lot excited about being here. With your permission, I will briefly summarize a few of the points in my written statement. The suggestions and views in my oral and written statements are my own views.

First, I would like to tell you about myself and how I got into the procurement field. After I completed my bachelor's degree, GSA hired me as a contract specialist intern. At that time, I hadn't even thought much about making procurement a career, but after 2 years of training, I found the profession both interesting and intriguing.

I had begun to realize exactly how important my job was as a procurement employee. I found my new job self-fulfilling and rewarding because I began to believe that I could make a difference in easing the taxpayers' burden. I learned that the very foundation of the procurement professional's job is to be effective guardians of the public fisc and to ensure a cost-effective expenditure of the taxpayers dollars.

I further learned that the very culture of a buying office was to seek and gain as much competition as practicable under a given set of circumstances. The more competition received, the more the contracting officer was assured that they had received a fair and reasonable price for the taxpayer.

Therefore, let me just assure you that no contracting officer needs to be told to seek maximum practicable competition. That is our goal. Whenever I spend money from the public fisc, I am in essence spending my own hard-earned dollars because not only am I a procurement professional, I am also a taxpayer. Therefore, acquisition professionals thrive on obtaining competition and getting the best deal for the taxpayer because, in essence, we are ultimately getting the best deal for ourselves and maybe possible tax cuts in the future.

Further, inherent to all of us is a motivation to win. Therefore, there is a certain personal satisfaction in coming away from the negotiating table with a deal that is rewarding. Whenever I have saved money for the taxpayer, I feel this personal satisfaction. So to enhance the knowledge I had already gained, I decided to return to school with a goal to complete a Master's of Business Administration degree with a contract and acquisition management concentration.

I successfully fulfilled this goal on my own time for myself, the Government and the taxpayer. However, the more knowledge I gained, the more frustrated I became with the current system. I would like to share only a few of my frustrations with you and ask for your help in eliminating these and the other problems outlined in my written statement.

The current regulatory and statutory framework leaves me virtually no room to exercise the training and knowledge I have gained. For instance, I have been the contracting officer for the service contracts to the Alfred P. Murrah Federal building for some time now. Yet during the current crisis, if procurement professionals had been required to maintain strict adherence to all the rules and regulations, the emergency needs of the Federal workers and the civilians in Oklahoma City could not have been met. However, since strict adherence to the rules and regulations were relaxed, I was able to quickly have janitorial service into new tenant-leased space and emergency elevator service to stabilize the existing elevators in the Murrah building to help in the relief effort.

Further, lower level managers have taken your cue and decided that if you feel as legislators that we need this voluminous restrictive requirements on procuring officials, they will do the same. So they give us a little more. The result, by the time I adhere to the statutes, rules, regs and management policies, the taxpayer has paid a tremendous price for this unnecessary oversight.

Further, I am concerned with the quality of management in the work force, that it should be enhanced by requiring managers and procurement professionals to obtain degrees with appropriate areas of concentration. Therefore, I am asking you to support legislation that further professionalizes the procurement work force.

Sadly, my frustrations with the current system have motivated me to return to get another graduate degree so that I can change career paths. Because of the current statutory framework, implementing rules and regulations, restrictive management policies and the apparent inability to progress in the procurement profession, I feel that I am not being fully utilized or allowed to use my training, education, and knowledge.

Thus, since my desire to remain as a procurement professional was to make a difference for the taxpayer and that goal seems in jeopardy now under the current system unless with your help this restrictive system is changed, I will likely leave the Government once I have completed my law degree, even though it was not my choice to do so.

Therefore, I am asking for your help in relaxing or removing the obstacles that hinder me so that I can make a difference in the way the public views the Government and its lawmakers in terms of the expenditure of funds. I am asking you to trust me, my knowledge, my education, my expertise by giving me responsibility and then holding me accountable. And once you have, I will give you and the taxpayer positive results.

Again, thank you for allowing me to voice my opinions.

Mr. CLINGER. Thank you Ms. Salih. I must tell you that you should be applauded for your ambition and I appreciate your very candid remarks. We are going to do everything we can to keep you in the procurement business. That is our objective.

[The prepared statement of Ms. Salih follows:]

PREPARED STATEMENT OF ELIZABETH SALIH, CONTRACTING OFFICER, GENERAL SERVICES ADMINISTRATION, FORT WORTH, TX

Chairman Clinger, Chairman Spence, and members of the House Committee on Government Reform and Oversight and the House Committee on National Security, it gives me great pleasure to appear before such a distinguished body to testify on acquisition reform. I thank you for this opportunity. I will be testifying from a front-line procurement professional and taxpayer's point of view. The suggestions and observations herein represent my own personal views.

I have been a front-line procurement professional for General Services Administration (GSA) for the past six years. During that time I have been involved in the procurement and administration of Building Services Contracts, administration of Architect/Engineering and Construction Contracts, and the procurement and administration of small purchases. In addition, I hold a Bachelor of Science Degree with a Political Science major, English minor, and a heavy emphasis in accounting. Later, after becoming a procurement professional for the Government, I returned to graduate school and completed a Masters of Business Administration Degree with a concentration in Contract and Acquisition Management. Currently, I am enrolled in Law School and anticipate completion of a Doctorate of Jurisprudence in December 1996. I have also been certified as a Contracting Expert under General Services Administration's Occupational Certification Program for Contract Specialists.

When I was employed by General Services Administration as a Contract Specialist Intern, I did not fully understand the functions I would be performing. Quite frankly, I had not even considered a career in procurement. However, the three years of training I received convinced me of the importance of each procuring action and the difference I could make in easing the taxpayer's burden. Therefore, instead of changing professions, I elected to seek a graduate degree with a concentration which would enhance my knowledge and skills in the procurement field. Although I may not have originally planned on a career in procurement, once I learned more about the profession, I made a conscious decision to remain in the profession and upgrade by skills because I had and continue to have a deep conviction and desire to bring about change to protect the interest of the taxpayer. Ultimately, I feel I can, with your help in relaxing and/or removing the obstacles that hinder me, make a difference in the way the public views the Government and its lawmakers in terms of the expenditure of funds.

As a Contracting Officer for the Federal Government, I am excited and enthusiastic about the procurement reform initiative. However, independent of the initiative, I am concerned with the Government's apparent lack of competitiveness with the private sector and advocate further reform to bring about a more competitive, efficient, quality procurement environment within the public sector. In particular, I have suggestions for reform in four areas relating to the quality of Government procurement of products and services. These four areas include the statutory framework and implementing Government procurement rules and regulations, management policies, and the quality and progressiveness of both the Government's management and procurement workforce.

STATUTORY FRAMEWORK/IMPLEMENTING RULES AND REGULATIONS

The current statutory framework which drives much of the regulatory and rule-making scheme tends to stifle creativity and innovation of Government procurement professionals. For example, the requirement to allow all interested parties to compete for Government contracting dollars, leaves the procurement official with very little judgment power in the award of contracts for supplies and/or services. Often, compliance with current competition rules and regulations culminate into the delivery of inferior products and services in exchange for an increased expenditure of taxpayer dollars. This particular problem is further aggravated by the statutory requirement that the sealed bid process be used under certain circumstances. H.R. 1670 recognizes this problem by providing for changes in these requirements.

The sealed bid method equates to buying from the low bidder with the only consideration of past performance addressed in a "go/no-go" responsibility determination. Thus, since all possible sources must be solicited and evaluated with the only determination of responsibility being based on a "go/no-go" type criteria, it is only when the Government gets "lucky" does the taxpayer receive the most for their money in terms of quality performance. By removing the preference for sealed bidding, providing more flexible and workable competition requirements, and adding additional considerations for past performance, the taxpayer benefits by receiving quality products and services for the lowest dollar.

The very foundation of the procurement professionals' job is to be effective guardians of the public fisc and to ensure a cost effective expenditure of the taxpayers' dollars. H.R. 1670 speaks of utilizing competition to the maximum extent practicable. Let me just assure each of you that no Contracting Officer needs to be told to seek maximum competition. The very culture of a buying office is to seek and gain as much competition as is practicable under a given set of circumstances. The more competition received, the more the contracting officer can be assured that the price is fair and reasonable. Whenever I spend money from the public fisc, I am in essence spending my own hard earned dollars because not only am I a procurement professional, but I am a taxpayer as well. Therefore, acquisition professionals thrive on obtaining competition and getting the best deal for the taxpayer because in essence we are ultimately getting the best deal for ourselves in terms of possible future tax cuts. Further, inherent in all of us is a motivation to win. Therefore, there is a certain personal satisfaction in coming away from the negotiating table with a deal that is rewarding. Whenever I have saved the taxpayer money, I feel this personal satisfaction.

Although the most basic way to achieve this objective is to seek and utilize competition to its fullest, it is not in the taxpayer's best interest to seek competition beyond the realm of good business judgment to a point that quality suffers and the administrative costs involved outweigh the benefits to the taxpayer. Therefore, to me and other procurement professionals, competition means more than "low bid"; it ultimately means quality for a reasonable, cost effective price.

Another area of importance and concern relating to the statutory framework and the implementing Government procurement rules and regulations is the absence of reprisals for frivolous contractor protests, the possibility of forum shopping, and inconsistent scopes of judicial review for protests and appeals. Currently, an aggrieved contractor must only expend $0.32 to protest or appeal a contracting officer's decision with no threat of reprisal for frivolous protests. However, under "Equal Access to Justice," the Government can be held accountable to the contractor for specific expenses in defending claims which are found by the judicial forum to be frivolous Government attempts of defense. Should not the taxpayer receive the same consideration afforded industry? I commend H.R. 1670 for promoting this concept. However, once the bill promotes the idea of reprisals for frivolous contractor claims, it immediately provides for an exception which allows the board of contract appeals to determine if such a reprisal would be unjust or unfair to the contractor. This exception gives the board total discretion to destroy the very purpose promoted in this provision of the bill.

Further, in relation to the current protests/appeals process, the contractor is allowed to "forum shop" amongst several various forums. In turn, each of these various forums make decisions independent of one another culminating in varying types of opinions. The procurement professional is then confronted with applying not only the applicable statutory and regulatory requirements, but also differing judicial type opinions as well; all to one subject matter. By eliminating forum shopping, the Government and contractor will benefit by unified decisions with a greater degree of contract law expertise applied to each decision. H.R. 1670 ultimately continues to allow as many as four forums; the United States Board of Contract Appeals, the contracting agency, the United States Court of Federal Claims, and the United States District Court. What is wrong with allowing the United States Court of Federal Claims to decide all contract disputes cases? This solution would provide contractors and Government procurement professionals with uniformity in decision making and a product which reflects a greater degree of contract law expertise.

Further, boards of contract appeals were created, in part, in an effort to reduce the cost of litigating in the judicial branch by allowing the utilization of relaxed procedural requirements. However, H.R. 1670 dictates that the new board of contract appeals will have discretion to decide whether the parties in dispute will be allowed to utilize discovery procedures. If this discretion is allowed, litigating under this new board will be as costly to the taxpayer as litigating under formal procedures.

In addition, the protest provisions of H.R. 1670 establishes a new board which in essence is the General Services Board of Contract Appeals with a new title which extends to the whole government. Therefore, H.R. 1670 ultimately advocates status quo. It is a shame that the protest portion of H.R. 1670 eliminates all of the progressive features of the rest of the bill. Millions of taxpayer dollars are spent each year in litigating and settling contract protests. Therefore, this area is one of deep concern to me as a Government Contracting Officer who is responsible for expending the taxpayer's money.

Even a further concern with H.R. 1670's protest provisions is the requirement for this new board to utilize Alternative Dispute Resolution procedures prior to beginning any type of litigation proceedings and to employ individuals to act as medi-

ators, arbitrators, etc. I am in favor of the utilization of Alternative Dispute Resolution procedures because these type proceedings ultimately save the taxpayer and the contracting community a substantial amount of money. However, I am not in favor of this function being given to a body which exercises judicial or quasi-judicial functions. The Federal Executive Board in my geographical location, which reflects the participation of various Federal agencies, has already trained individuals as mediators, maintains a current roster of available mediators, and has as of this date successfully settled many contract disputes. Therefore, by the time any dispute originating within my geographical region reaches the litigation stage, Alternative Dispute Resolution procedures have already been utilized. Why would the taxpayer need to make an additional contribution of funds for a function which is already being successfully performed?

I support the proposal to review agency actions based on the arbitrary and capricious test of the Administrative Procedures Act. Presently the justice scale is slanted in the contractor's favor. By limiting the judicial standard of review to the arbitrary and capricious standard noted in the Administrative Procedures Act, the scale becomes more level with the taxpayer receiving the same consideration currently provided industry. In addition, it is my belief that by applying the arbitrary and capricious standard, the overall industry will benefit as well as the taxpayer. All companies pay taxes as well as their owners and employees. If the current system is allowed to continue or even a more slanted system adopted, one protesting/appealing firm may receive a benefit, but all other firms both inside and outside the industry will help pay for the costs through their tax obligations.

In addition to the foregoing concerns, Section 201 of the Federal Property and Administrative Services Act of 1949 is particularly burdensome to the public sector's cost effectiveness. The issuance of utility contracts is based on provisions outlined in the current statutes and implementing rules and regulations which require that every financial obligation or payment for supplies or services be supported by a contract. In most cases, utility services such as electricity, gas, water, etc., are only available from one source and that source is regulated by state or local governmental bodies. Under this regulatory authority, approved by the appropriate regulatory body, utility companies must provide service to customers at the lowest rates applicable to the customers' circumstances. Thus, such companies are precluded from negotiating special rates with individual customers including the U.S. Government.

As a result, the government invests its resources in trying to persuade utility companies to sign contracts when the products of these efforts is not a lower price or better service. In reality, the process merely represents months of preparation of a contractual document and "arm-twisting" exercises in an attempt to coerce the utility company to sign a contract which it does not want nor need, but which the Federal Government insists it must have.

Compliance with the requirements for utility contracts under these circumstances is both a time-consuming and expensive transaction for the taxpayer. The Federal Government should be allowed to accept and pay for utility services provided by monopolistic, regulated utility companies without the utilization of an implementing contractual document just as private industry and we as citizens do.

Until the statutory framework that drives the implementing rules and regulations are revisited and changed, the Government cannot effectively compete with nor become as efficient as private industry and thus, the taxpayer will continue to be deprived of the benefits of a Government that works better and costs less.

MANAGEMENT POLICIES

In addition to the constraints placed on Government procurement professionals by the present statutory framework and implementing regulatory and rulemaking procedures, management has enacted additional constraints which eliminates the small percentage of discretion left open by the statutory framework and implementing rules and regulations, and thus completely stifles any form of creativity or innovation by the front line workforce. Moreover, most of the statutory requirements and implementing Federal Acquisition Regulation directives are further supplemented by agency regulations, orders, and standard operating procedures. Under these types of procedures, the Contracting Officer is unable to exercise any type of discretionary business judgment when in essence, they are the very individuals with the most knowledge of the circumstances surrounding the procurement. How can the Government be competitive with the private sector when the individuals with the most knowledge of the facts and circumstances surrounding a particular procurement are prohibited from rendering any type of business judgment? How can it be

cost effective and efficient to require front line procurement professionals to brief and seek approval from several layers of management before acting?

Further, the Government cannot be efficient, cost effective, and competitive as long as such managerial practices as requiring signatures of each manager between the preparer of a document and the ultimate signer are in place and enforced. It is not uncommon for a particular document to be reviewed and approved by six various managers prior to review by the person with the ultimate authority to sign the document. These types of procedures are ineffective, time-consuming, expensive, and add little or no value.

QUALITY AND PROGRESSIVENESS OF MANAGEMENT

Private industry is continually addressing the necessity of training its managers in the latest managerial concepts and theories to improve its place in the market and in addition, views continuing education of its managers as a competitive advantage crucial to its survival in the current marketplace. This is an area in which the Government lacks the insight of the private sector. Most lower level Government managers lack the education and training to enhance the competitiveness of the public sector. It is imperative for the Government to require its managers to be fully trained through outside as well as inside sources. Most lower level Government managers have an excessive amount of Government experience, yet have failed to enhance their experience with baccalaureate and graduate degrees and continuing education courses.

Through academia, new management concepts, theories, and practices are continually invented, refined, and tested under practical applications. The managerial practices of yesterday are not necessarily sound business practices of today. The Government must learn from the private sector that its management must be willing to adapt and change as the procurement process evolves under a new environment and culture. To be competitive, Government managers must be able to lead in today's environment, not under yesterday's concepts and practices.

The changes that are advocated and implemented by highest management are unfortunately not being passed through by lower level managers. Thus, the changes are occurring horizontally but not vertically. As a procurement professional, I feel if lower level managers allowed the ideas, concepts, theories, and practices of highest management to penetrate to the grassroots, the Government's effectiveness and efficiency in the procurement of supplies and services would be greatly enhanced.

I am aware of Congresswoman Maloney's interest in the acquisition workforce. I have reviewed the discussion draft of a bill prepared by GSA in response to her request and I agree with its basic principles. However, from my perspective as a taxpayer and a procurement professional working at the front line on a day to day basis, to bring about maximum efficiency and cost effectiveness, these principles should be taken a few steps further. Not only should new hires in the procurement profession be required to hold a baccalaureate degree, but both current and future managers should also have to meet this requirement.

Further, in an effort to retain qualified employees, the civilian sector must be empowered to promote highly qualified, highly educated individuals from within on a merit basis without the normal Government progression from, for example, a GS12 to 13 to 14. Also, allowances must be made to move these highly qualified employees from one job series to another without being downgraded to the beginning trainee position, so the agency receives full benefit from its resources. In addition, higher level managers must be empowered to carry out this initiative without delegation to lower level managers. Lower level managers who have been promoted on the basis of a high school education or less plus the number of years service as a Government employee are unlikely to promote individuals with fewer years of Government service holding varying types and numbers of degrees since such individuals become the hiring manager's competition at a later date.

In addition to enhancing the quality of the lower level workforce, once highly qualified and educated managers are employed, they must be held accountable. One large detriment to the public sector's ability to improve itself is the difficulty the public sector apparently has in releasing individuals who no longer can nor will perform efficiently and effectively. To increase productivity the Government must continually purge itself of managers who are no longer effective.

By allowing the current managerial practices to continue, the Government "shoots itself in the foot" in terms of competitive advancement and efficiency and the American citizens ultimately pay for it. Therefore, I am asking Congress to support legislation that professionalizes the procurement workforce by raising standards for employment as well as compensation.

QUALITY AND PROGRESSIVENESS OF THE PROCUREMENT WORKFORCE

The Government's competitiveness, efficiency, and cost effectiveness is further directly tied to the quality of its acquisition workforce. The civilian sector has made a number of forward strides in its quest to upgrade the quality of its employees by enacting internship programs and the Contract Specialist Occupational Certification Program. These programs have helped to enhance the knowledge of the acquisition workforce and provide the technical expertise required to effectively perform as a contracting professional. However, they cannot adequately compare to the knowledge to be gained from an academic setting. In the procurement of Government training services, price is a factor which in many instances equates to substandard quality. Moreover, the class pass rate is utilized in the evaluation for future awards. The pass rate in these Government sponsored classes are extremely high and thus, do not adequately reflect actual knowledge gained.

In relation to the courses required by the Contract Specialist Occupational Certification Program, managers must use sound business judgment in requiring employees to fulfill each course requirement. For example, it fails to be sound business judgment when an employee with a recent Masters of Business Administration degree with a concentration in Acquisition and Contract Management is forced to take the Government sponsored Advanced Contract Administration class and then at a later date complete the Government sponsored Basic Contract Administration course; particularly when the individual has received almost perfect scores in both the applicable Masters course and the Government sponsored Advanced Contract Administration class. In this instance, the taxpayer is funding an activity which fails to add value.

Here, my concerns are similar to my concerns with the quality of management and again, I feel that as a front-line acquisition professional, the principles advocated by Congresswoman Maloney are definitely on the right track. However, I have a few suggestions for taking further steps to promote the underlying principles she advocates.

Employees should not only be encouraged, but required to participate in university degree programs if they currently do not hold at least a baccalaureate degree with an emphasis in business, law, or accounting and subsequently, to enroll in continuing education courses to keep current on procurement issues and practices in the private as well as the public sector. However, it is unlikely that managers will encourage this type of participation in the academic setting when they fail to see the value in seeking and achieving the completion of degree status themselves.

To further enhance the savings of the public fisc and to promote greater competitiveness and efficiency, it is imperative that the Government upgrade the quality of its workforce by requiring that current procurement employees successfully complete a degree with an emphasis in business and place an equivalent prerequisite on future hires. However, I am afraid that discretionary waivers of these requirements will only allow managers who fail to see the value of a university degree and who refuse to seek such a degree for themselves to maintain the status quo.

As in the managerial arena, once these highly qualified and highly educated procurement professionals are employed, they must be held accountable. Lower level managers must be willing to eliminate inefficiency in the workforce. If these highly qualified individuals are no longer willing or able to perform at a high level of efficiency, the public sector manager must have the same conviction as the private sector manager and take the action which is in the best interest of the taxpayer (release employees who no longer add value).

CONCLUSION

In summation, the public sector should be as efficient, cost effective, and quality oriented as the private sector. However, to accomplish this mission, changes must occur, some of which could be considered radical in nature. In its private business transactions, the private sector does not operate under statutorily driven implementing rules and regulations which are so voluminous that it takes three-two inch binders to contain them. Nor do they operate under an additional four inch binder full of rules interpreting the first set of rules and regulations. Nor do they operate under a further set of orders, standard operating procedures, and management policies which interprets the supplemental interpretation of the basic set of rules and regulations.

Due to the urgency of the situation during the Oklahoma City bombing crisis, management allowed front-line procurement professionals to operate without adherence to management policies and standard operating procedures and in addition, under the unusual and compelling nature of the circumstances, strict adherence to the rules and regulations were relaxed in an effort to meet the emergency needs

of the federal workers and civilians in Oklahoma City. The emergency effort in Oklahoma City was highly successful and the needs of the unfortunate were met timely and in a quality manner. This effort was successful even though front line procurement professionals were allowed total discretion to perform this extremely important and highly visible task. The successfulness of the relief effort speaks directly to the support of relaxation of statutory and regulatory requirements and the elimination of those rules, regulations, and management policies which are inappropriate and in conflict with good business judgment. Front line procurement professionals must be entrusted to effectively and efficiently do their job in a quality, cost effective manner with the realization that when they do not, they will be held accountable. The bottom line is: give me responsibility and then hold me accountable.

However, to operate effectively, the public sector must employ highly educated, highly qualified lower management leadership. The Government needs new ideas and current management philosophies in order to bring about the necessary change required to be competitive, efficient, and progressive. Absent a requirement to upgrade and/or educate the current lower level leadership and subsequently hold them fully accountable for their actions/inactions, the Government will remain the epitome of bureaucracy.

Further, if the statutory framework and implementing rules and regulations are to be revised, as they well should be, and management oversight reduced, it is exkemely important that the workforce be qualified to perform these discretionary functions in a quality, cost-effective, and efficient manner. Front line procurement professionals are the individuals who ultimately spend the taxpayers' money and are conscious in this task. However, in an effort to improve the current level of effectiveness, it is only sound business judgment that individuals responsible for spending the firm's profits (i.e., taxpayer dollars) must be highly educated and qualified to result in maximum shareholder return on investment (i.e., maximum retention of the public fisc). Further, as in the private sector, these procurement professionals must be held accountable for the full term of their careers.

If the statutory framework and implementing rules and regulations are relaxed and management policies eliminated so that I can do my job as I have been trained to do and at the same time, if legislation is enacted requiring further upgrading of the current quality of management and the procurement workforce, it is my belief that the public will begin to view the Government not just as a bureaucracy, but as an efficient entity expending their hard earned money in a cost effective way. As a Government Contracting Officer, I want the taxpayer to view what I do as a symbol of professionalism and efficiency. As legislators you can bring this about for me and the taxpayer if you will relax the statutory requirements which impede my ability and desire to be progressive, efficient, and cost effective for the public and in return, the taxpayer will give you credit for laying the foundation to save them money. If you will give me responsibility, I will give you and the taxpayer positive results. I am not afraid to be held accountable because I have confidence in my ability to do a great job for the American public. This is the attitude you will find in the majority of procuring offices among the majority of procurement officials because it represents the epitomy of the procurement culture. In the situations where this type of attitude is not present, lower level managers must accept the responsibility to eliminate the individuals which impede progress and if held accountable these type managers will likely do so.

Sadly, my frustrations with the current system have motivated me to return to yet another graduate school in an effort to change career paths. Because of the current statutory framework, implementing rules and regulations, restrictive management policies, and the apparent inability to progress in the procurement profession, I feel that I'm not allowed to fully utilize my training, education, and knowledge. Thus, since my desire to remain as a procurement professional was to make a difference for the taxpayer, and the current system prohibits me from achieving that goal; unless, with your help, this restrictive system is changed, I will likely leave the Government once I have completed my law degree, although it is not my choice to do so.

We must all remember that to bring about public sector competitiveness, efficiency, cost effectiveness, and quality, it is essential to recognize that too much bureaucracy only stagnates progress; larger bureaucracy does not translate into larger efficiency; quality, responsibility, and accountability does. Again, I thank you for this opportunity to address procurement reform from a front line procurement professional, taxpayer's prospective and to share with you the values I hold.

Mr. CLINGER. Colonel Case.

STATEMENT OF COL. JOHN M. CASE, U.S. AIR FORCE, PROGRAM DIRECTOR, MAXWELL AIR FORCE BASE, MONTGOMERY, AL

Colonel CASE. First, I would like to caveat that my remarks are focused not on the specifics of the bill. I was asked to comment on experiences I have had specifically with the GSBCA appeal forum and that is what my remarks are focused on. They are based on experiences that I have had as program director for a major DOD information technology procurement and also as a member of several source selection advisory councils for other information and technology procurements during the past decade.

I strongly agree that there is a need for a protest forum to quickly resolve disputes. But I believe that just as medicines often have unexpected and undesirable side-effects, the current GSBCA forum has produced many undesirable side-effects and I would like to talk to some of those today.

First, the specter of the very onerous GSBCA protest has caused much undue emphasis on what the protests impact of virtually any action might be. This emphasis tends to be pervasive, from the preparation of the solicitations through the acquisition strategy discussions and during evaluation activities and subsequent source selection deliberations.

If I might digress for a moment on what I had planned to say, you have heard several comments today about the unwillingness to remove competitors from the competitive range early. Many of those discussions are because of fear of protest. There is a clear elongation of the evaluation process caused by this focus on protest proofing of a procurement rather than focusing on the real requirement for the particular procurement. In my experience, I think we probably add as much as 50 percent to the time that we take to evaluate proposals until we get to award because of this emphasis on protest proofing of a procurement and additional activities that we undertake.

As a direct, recent example, on one procurement I was involved on, we spent over 2 months and over $50,000 in consultancy fees merely to prepare a very detailed best value report that quantified subjective elements of a decision the source selection authority had made. The simple fact is that the reasonable, subjective judgment of a source selection authority is not accepted by our current process.

There certainly needs to be a justifiable basis for award decisions but I do not believe we should have to expend inordinate resources to quantify decisions that none of us would consider unreasonable. As an example, I choose to drive a car for a family that costs about $25,000. I don't think that is unreasonable in today's market. However, if I had to justify the purchase of that over several other cars that are currently available for about $20,000, I have no doubt I could not do so based on the standard of review that our acquisitions are subject to. Nevertheless, I believe that I made the right decision based on the safety, comfort, space requirements that I felt were important for our family's automobile. I am convinced that the current GSBCA protest process with its comprehensive de novo review of virtually everything forces a focus on what is defensible

rather than what is the best value for the taxpayer and the requirements.

Next I would like to briefly focus on the direct burden of the protest-related activities from a GSBCA protest. There is a very comprehensive submission known as the Rule IV file which must be produced within 7 days of a GSBCA filing. This is essentially a complete set of all proposals, evaluation materials, briefings, correspondence and virtually anything else which is or could be even remotely related to the solicitation and/or evaluation process.

The initial deadline is to deliver that within 7 days. There is no consideration in that as to holidays, time of year, or any other considerations which might impact personnel availability. The mechanics of preparing this file are onerous. Believe me, I have been through it. For one recent case with only five bidders, the required Rule IV file copies consisted of nearly 400 binders containing over a quarter million pages and the mere Federal Express charges to deliver it were over $2,000, not counting the cost to prepare it.

In another case, there were over 40 bidders. The Rule IV file was so extensive that the organization involved rented a truck and drove it 1,000 miles to Washington to get the material here in time.

The pace of activities throughout the protest does not slow down and there is a significant cost to meet the time lines. In addition to extensive salary and travel costs for Government personnel, the ancillary costs of suppliers, reprographic support, court reporters, paralegals and shipping costs constrain program office budgets. These costs alone have ranged from over $100,000 to nearly half a million dollars for a recent information technology protest. You have already heard from industry on some of the costs that they have mentioned today.

Finally, I have a few quick comments on other impacts. The activities I have just described cause a great deal of mental anguish, often resulting in key staff losses that can be difficult to overcome. The bitter taste that the de novo review process leaves on the participants is very difficult to explain and even more difficult to overcome because of the adversarial relationships it creates.

Second, clearly protests cause program delays, causes technology to become obsolete, causes needed services and equipment to be delayed in terms of provision to customers.

And finally, you can have nearly fatal funding problems within programs because of these delays because funding will cross a fiscal year boundary and you no longer have funding to accomplish these objectives. I believe these additional costs in lost productivity, both on the Government's part and the bidder's part, are the most significant in dollars terms and can amount to millions or even tens of millions of dollars.

In summary, the GSBCA process allows, from my prospective, a protester to virtually throw darts in the decision and, if a single hit is scored, to overturn the award. Our standard for an award decision is essentially perfection.

To return to my earlier analogy of my automobile, if it was discovered that I didn't have a light in the glove box and if that had been a requirement, our standard would require me to return the car and reprocure it rather than the common sense solution of buying a light. I am convinced the taxpayer would be better served by

a less onerous protest process. It does need to be a fair and equitable process, but it needs to be fair not only to the bidders, but also the procuring activity and ultimately to the taxpayers. Our standard must be reasonableness, not perfection.

Thank you.

Mr. CLINGER. Thank you very much, Colonel Case. I would say parenthetically that the very issues that you raise are the ones we are trying to address in this bill, so it is very helpful to have your testimony as to the difficulties that you have had in coping with an arcane system.

Now I am pleased to recognize a very able partner in the efforts that we are attempting to accomplish in this committee and that is to reform our regulatory processes and our procurement processes, Steve Kelman.

STATEMENT OF STEVEN KELMAN, ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET

Mr. KELMAN. Thank you, Mr. Chairman. First, let me apologize on behalf of Coleen Preston, who has a year-old commitment to a Senator—I hope that is not disqualification—to attend a large conference for small businesses on electronic commerce. She is represented by her Deputy Captain, Barry Cohen, of acquisition reform at DOD.

Chairman Clinger, Chairman Horn, Congresswoman Maloney, I am very pleased to appear today to talk about H.R. 1670. The two committees that are holding this hearing today played a leadership role in passing the Federal Acquisition Streamlining Act last year and the administration salutes you for your boldness and your creativity in working this year to extend the benefits that we directed toward the smaller dollar value procurements in last year's bill and to try to expand those benefits to larger dollar procurements.

The administration is committed to working with you in a spirit of bipartisanship to achieve significant additional procurement reform legislation this year. Let's show that bipartisanship can work both on behalf of the taxpayer and on behalf of civil discourse in our society. As we move forward to reinvent the procurement system, the administration's byword is competition, yes; bureaucracy, no.

Over the years, we have developed a bureaucratic process that we call competition, but as some of the representatives from the commercial marketplace indicated in their testimony today is unrecognizable to people in the commercial marketplace who actually know something about competition.

Earlier this year the administration made a number of specific proposals to remove some of the bureaucratic requirements for larger buys. H.R. 1670 takes a somewhat different approach to the same problem by changing the competition standard and leaving a lot to the regulation writers. We are intrigued by this approach. We believe that whatever approach is taken, the most important thing is to get the constipation out of competition, to allow the Government to move toward the kinds of streamlined, value-added competitive techniques that are used successfully in the commercial marketplace. As we do this, we pledge to keep two things in mind.

First, we must never allow streamlined competition to be a synonym for sole source buys. As in the commercial marketplace, the Government as a customer must seek vigorous competition from business, including from small businesses. Second, we must make sure that doing business with the Government never becomes the province of a closed circle of suppliers. We must find ways in the context of streamlined competition to encourage new firms to enter the Government marketplace.

Let me finally say a few words about protest reform. The administration very strongly believes that any attempt to reform the procurement process, no matter how streamlined and empowering its design, is destined to fall short of its expectations as long as we leave mechanisms in place that allow, in fact encourage, contractors to treat contracts as entitlements and to manage their Government customers by litigation.

For this reason, as you know, we made protest reform a top priority in our overall efforts to strengthen the procurement system this year. Right now we have two administrative fora to look at bid protests, the GAO which uses simple informal procedures and currently covers about 90 percent of Government procurements, and the GSBCA with extremely intrusive, discovery intense, litigation intense procedures and a very undeferential standard of review that covers about 10 percent of the procurement dollars.

In the GSBCA forum, our senior procurement officials are routinely put in a situation through depositions and hearings where they are forced to undergo as part of their job description the procurement equivalent of the cross-examination of Dennis Fung simply in order to fulfill their jobs as Government officials.

Please note that the executive branch is not alone in recognizing the problems that have ensued from the process used at GSBCA. Professors Ralph Nash and John Cbinic, regarded by many as the Nation's most prestigious legal scholars on public contract law, have written that they prefer GAO approach to that of the GSBCA because it is "the least formal and least expensive of the forums." Adding, as they put it, additional formalities and expensive discovery techniques to the GAO process, they argue, would present a face that only a lawyer could love.

In addition, the Procurement Roundtable, a blue ribbon panel of the Nation's most distinguished procurement experts recently testified before Chairman Horn's committee that particular attention must be paid to "minimizing the need for and ability to protest" IT procurements.

Mr. Chairman, I must express the administration's very deep, I would say grave, concerns about the bid protest language in H.R. 1670. We believe its provisions would actually make the current system worse. H.R. 1670 would create a powerful independent forum that would replicate for the entire Government many of the intrusive and litigation intensive procedures currently limited to the GSBCA, to 10 percent of procurements.

We believe that the bid protest provisions as written will increase lawsuits, not decrease them. We believe that the bid protest provisions as written will make it more expensive for the Government to defend these lawsuits and unless we close the abuse that currently allows protesters to get paid by the Government for suing

their customers, we will also increase the cost the taxpayer pays out to protesters in lawyer, consultant, and expert witness fees and thus further strain decreasing Government resources.

In this area, we have shown a willingness to search for a solution acceptable to the widest possible range of participants in the process and will continue to work on that very intensively over the next few weeks. But such a solution must involve meaningful reform. It cannot be a step backward. The administration seeks to cooperate with you in our joint and ongoing effort to bring about a better procurement system.

Thank you.

[The prepared statement of Mr. Kelman follows:]

PREPARED STATEMENT OF STEVEN KELMAN, ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET

Chairman Clinger, Chairman Spence, Congresswoman Collins, Congressman Dellums and members of the Committees, I am pleased to appear before you today at this joint hearing to discuss the Administration's views on H.R. 1670, the Federal Acquisition Reform Act of 1995. It is very important to continue our efforts to make the federal procurement system more efficient and to allow the government to select high-quality contractors offering the government good prices. The taxpayers cannot afford a bureaucratic, inefficient procurement system any longer. We believe that it is critical that the system remain open to new companies entering into the government marketplace. And, we must make it a priority to continue our efforts to adopt, wherever practicable, the best of the methods commercial businesses use when buying goods and services.

We are in a time of change which requires that we continue to question the traditional ways of conducting our procurement business. The President spoke about examples of procurement reinvention in his State of the Union address, and Speaker Gingrich discussed the need for procurement changes in a televised speech after the first hundred days of this Congress. In February of this year, the Administration submitted an acquisition streamlining proposal (H.R. 1388), which you introduced in the House by request, and which was introduced by Senator Glenn in the Senate as S. 669, to start the reform process. We believe the time for bold action is now.

Your two committees played a leadership role in the passage of the Federal Acquisition Streamlining Act (FASA) last year. And the Administration salutes you for the boldness and creativity you are showing this year in working to extend to larger dollar-value procurements the same benefits we extended to smaller-dollar value procurements in FASA last year. The Administration is committed to working with you in a spirit of bipartisanship to achieve significant further procurement reform this year. Let's show that bipartisanship can work.

As we move forward to reinvent the procurement system, the Administration's byword is: "competition yes, bureaucracy no." Over the years, we have developed a bureaucratic process that we call "competition" but that would be unrecognizable to people in the commercial marketplace who actually know something about competition.

COMPETITION

Earlier this year, the Administration made a number of specific proposals to remove some of the bureaucratic requirements for larger buys. We asked for reforms to allow for more aggressive competitive range determinations, for authorization of innovative techniques such as two-step procurement and evolving solicitations, for reducing statutory bureaucratic reviews and sign-offs and for reforms to improve the bid protest process so that stifling bureaucracy designed to defend against protests could be reduced.

H.R. 1670 takes a somewhat different approach to the same problem, by changing the competition standard and leaving much to the regulation writers. We are intrigued by this approach. We believe that, whatever approach is taken, the most important thing is to get the constipation out of competition—to allow the government to move toward the kind of streamlined, value-oriented competition that exists in the commercial marketplace.

As we do this, we pledge to keep two things in mind. First, we must never allow streamlined competition to be a synonym for sole-source buys. As in the commercial marketplace, the government as a customer should and must seek vigorous competi-

tion for our business. Second, we must make sure that doing business with the government never becomes the province only of a closed circle of suppliers. We should and must find ways in the context of streamlined competition to encourage new firms to enter the government marketplace.

QUALITY BASED PROCUREMENTS

I note that the bill would amend the Office of Federal Procurement Policy Act to establish a quality based competition system. We support the concept of evaluating contractors' business practices, product or service quality, and past performance and "verifying" such firms to become eligible to compete in competition with other "verified" firms. This proposal is a unique and innovative way of maintaining a base of qualified contractors to meet the government's needs while retaining the incentives created by competition. If enacted, these provisions should clearly provide for a continuing opportunity for new firms, including small businesses, to apply for this program.

COMMERCIAL ITEMS

As you are aware, FASA established a preference for the acquisition of commercial items and gave us new tools to achieve this goal. H.R. 1670 would provide even greater innovations in buying commercial items. Relief from the burdensome requirements of the Truth in Negotiations Act (TINA) and use of simplified procedures for commercial items would greatly assist us in our goals of encouraging large and small new firms to contract with the Government. We strongly support this provision.

TEST AUTHORITY

We are also pleased to note that the bill would amend FASA to allow the OFPP Administrator to initiate tests of innovative procurement procedures without waiting for implementation of other FASA provisions, as would otherwise be required by FASA. This is a significant step in that it would allow us to get some of the good ideas provided by public officials and private sector firms under way as tests.

INTERNATIONAL COMPETITIVENESS

Mr. Chairmen, we also support the bill's provisions concerning elimination of recoupment of nonrecurring costs in foreign military sales programs.

PROCUREMENT INTEGRITY

Mr. Chairmen, we applaud your efforts to streamline and clarify the procurement integrity laws. The current procurement integrity statutory provisions are so complex that the provisions themselves provide that affected individuals can request legal opinions to interpret the rules that apply to their conduct. Clarity is essential for statutory provisions that impose such stiff criminal and civil penalties. H.R. 1670 would increase the general understanding of the conduct expected and the limitations imposed, by adding new provisions that address disclosing and obtaining certain sensitive procurement information. Like the Administration's proposal, H.R. 1670 would focus on the information to be protected, rather than the status of persons who might disclose or obtain the information, or the stage of a procurement at which the information would be generated. By clarifying these provisions, your bill would relieve circumstances where, I believe, legitimate, necessary, exchanges of information between contractors and agencies are unduly restricted. As we increasingly move from the use of government specifications that dictate how the work is to be done to the use of specifications that describe the government's needs in functional and performance terms, effective information exchange is crucial. Agencies need more effectively to gather information on the latest and best that industry can offer to meet the government's needs, and contractors need enough information to decide intelligently whether or not to make an offer on a specific contracting opportunity.

H.R. 1670, however, differs from both the current procurement integrity statutory provisions and the Administration's proposal in that H.R. 1670 would change the level of intent necessary to show a violation of the Act from "knowingly" to "knowingly and willfully." This standard is much more restrictive. According to the Department of Justice, it would be virtually impossible to obtain convictions or civil penalties under H.R. 1670 if the Government must prove that the conduct was "willful." We suggest that the bill be amended to delete the "willfully" language and retain the "knowing" standard, consistent with the Administration's proposal. H.R. 1670 also provides that an agency may declare void or rescind a contract, if conduct

prohibited by the statute occurs in connection with the contract. The provision would require, however, that the agency show that the conduct occurred by "clear and convincing" evidence. This is much more restrictive than the ordinary standard used in such cases—preponderance of the evidence. We recommend that, consistent with the Administration's proposal, a "preponderance of the evidence" standard be included in that section of H.R. 1670. We also recommend increasing the maximum criminal penalties for violation of the laws regarding protected information, as provided in the Administration's proposal.

We strongly support eliminating the current burdensome and bureaucratic procurement integrity certification requirements. These requirements are unlikely to deter deliberate criminal conduct, nor do they ensure that clear guidance is provided to the vast majority of Government and contractor employees who want to abide by the rules.

REFORMING THE PROTEST PROCESS

Mr. Chairmen, I would like to devote the remainder of my statement to the issue of bid protest reform. As you know, the Administration firmly believes that any attempt to reform the procurement process—no matter how streamlined and empowering its design—is destined to fall short of expectations as long as we leave mechanisms in place that allow, if not encourage, contractors to treat contracts as entitlements and manage their customers by litigation. For this reason, we have made protest reform a top priority in our overall efforts to strengthen our procurement system.

The objective should be to ensure rational judgments—not process perfection. The various protest proposals the Administration has put forth seek to reduce the burden and cost that is currently imposed on acquisitions—especially on information technology (IT) procurements—while maintaining the necessary role protests play in ensuring the integrity of the process. We would do this, essentially, by applying across-the-board the more informal and inexpensive model currently used by the General Accounting Office (GAO) to replace the intrusive, judicialized process CICA set up in the General Services Administration Board of Contract Appeals (GSBCA) to resolve protests of IT procurements.

You should note, Mr. Chairmen, that the executive branch is not alone in recognizing the problems that have ensued from the process CICA endorsed for use by the GSBCA. Professors Ralph Nash and John Cibinic, regarded by many as the two most eminent legal scholars of public contract law, have written that they prefer the GAO approach to that at the GSBCA because it is "the least formal and least expensive of the forums." Adding "additional formalities and expensive discovery techniques" to the GAO process, Nash and Cibinic conclude, would "present a face that only a lawyer could love." You might also recall that at the recent hearing before the Subcommittee on Management of Government Reform and Oversight, the Procurement Round Table, a blue-ribbon panel of the nation's most distinguished experts on government procurement, testified that particular attention should be paid to "minimizing the need for and ability to protest [IT] procurements."

From what I understand, the American Bar Association's Section of Public Contract Law has also acknowledged that change is needed to ensure that our protest process is simpler, less expensive, and more effective. The changes they are considering, such as a reduction of discovery and hearings—two prominent features of the protest process at the GSBCA—suggest that they realize that the current process need not be as burdensome as it is.

After reviewing the changes proposed by H.R. 1670, Mr. Chairmen, I must unfortunately express the Administration's very deep concerns. Its provisions actually make the current system worse. H.R. 1670 would create a powerful independent forum that would replicate for the entire government many of the burdensome features of the GSBCA and lose much of the informality and nonintrusiveness of the GAO process. We believe the bill, as written, will increase lawsuits, not decrease them. We believe the bill, as written, will make it more expensive for the government to defend these lawsuits and—unless we close the abuse that currently allows protesters to get paid by the government for suing us—will also increase the costs the taxpayer pays out to protesters in lawyer, consultant, and expert witness fees. These provisions would therefore further strain decreasing government resources.

To better understand my point, let me take a moment to describe the very different processes used by the GAO and the GSBCA.

The Difference Between the GAO and the GSBCA

Consistent with CICA, the GAO protest process is designed to afford protesters a chance to challenge decisions they believe are not rationally based with a minimal amount of disruption to an agency's program. While the timely filing of a protest

automatically stays the award or performance of the challenged contract until the GAO issues its recommendation, an agency may override the stay if it concludes that there are urgent and compelling circumstances. Agency decisions are accorded great deference, and a GAO recommendation for corrective action will not be made unless the agency's decision lacks a rational basis or it involves a clear and prejudicial violation of applicable statute or regulation. Review is generally based on a written record, constructed in part through document discovery by the parties. Hearings are held only on rare occasions where a matter cannot be decided solely on the written record and issues for hearing are limited and required to be clearly defined in advance of the proceeding. In all, agencies can defend a GAO protest with a reasonable amount of resources. As a result, the impact on the overall mission on behalf of the taxpayer—both in terms of costs and labor hours—is acceptable for the type of oversight the GAO provides.

Despite its informality, I wish to point out that agencies take the GAO process seriously. While agencies are vested with the power to proceed with a procurement in the face of a protest to the GAO, GAO statistics on protests filed between FY 91 and FY 94 indicate that agencies do so on only five percent of the cases filed.

While endorsing the informality of GAO's review process, CICA gave far less consideration to the potential for disruption when it fashioned the protest procedures to be used by the GSBCA. Consider that when a protest is filed at the board, the board must suspend the procurement upon request of the protester unless the agency can establish to the board's satisfaction at a suspension hearing that urgent and compelling circumstances exist. Furthermore, the GSBCA is not required to accord deference to agency decisions in conducting its review. CICA authorized the GSBCA to take a fresh, independent look at the matter at hand. Under this so-called "de novo" type review, the board creates its own record and typically permits a wide—essentially unlimited—range of discovery to be undertaken by the parties to accomplish this task. In addition to compelling the production of documents, parties may query potential witnesses either through written questions (interrogatories) or orally (depositions). Hearings (and the testimony of expert witnesses) are the norm.

There are two especially alarming ramifications associated with this process:

First, it is unnecessarily disruptive of agency missions.

The very nature of the de novo review process lends itself to second-guessing and a degree of examination well beyond what is needed to determine whether an agency's actions were reasonable. This occurs because de novo review permits the GSBCA essentially to redo the procurement process based on its own analysis of the agency's actions. In fact, one GSBCA judge even noted in a decision that this approach "is causing [the board] to intrude in the day-to-day procurement decisions of federal agencies, perhaps even more than we or [Congress] might have anticipated."

You might note that the de novo type review is currently used by agency boards to resolve contract disputes pursuant to authority provided in the Contract Disputes Act (CDA). CICA extended the application of this type of review to bid protests. I view this provision as flawed because it ignores the fundamental difference between an agency decision to award a contract and an agency decision to deny a contractor's demand for relief pursuant to a contract.

Where a contractor is demanding compensation pursuant to the terms of a contract, it is asking the board to make a determination on entitlement. There is no cause to give deference to the contracting officer's decision because the question before the board is not whether the decision reached by the contracting officer was reasonable, but rather whether the contract required the contracting officer to pay the compensation claim of the contractor. In this situation, an independent analysis such as that contemplated by a de novo review is proper, for it enables the board to sort out the facts and apply its government contract expertise to arrive at its own best answer as to the contractor's entitlement to relief under the terms of the contract.

By contrast, where a bidder is challenging an award decision, there is no question of entitlement because there is no contract. In this situation, deference to the contracting officer's decision is appropriate, for the agency knows how best to carry out its mission and it, unlike the protest forum, can be held accountable for its success or failure. Even the board itself will admit that it is both imprudent and improper for it to substitute its judgment for that of the agency. Yet the de novo review demands no deference. To the contrary, it sanctions the board to rework the entire evaluation process. To undertake such a process simply to determine if the contracting officer's decision was reasonable is wasteful, intrusive, and invites precisely the type of inappropriate second-guessing that discourages innovative and creative thinking.

It is also important to note that the suspension process at the GSBCA causes further disruption to agency missions. Given that agencies are in the best position to know the urgency of their requirements, it is wasteful to require a showing to a third party—not to mention that the required showing is apparently so high that it is near impossible to overcome. In one decision involving a procurement for an automated system to warn more quickly of life-threatening weather conditions such as tornadoes, and flash floods, the board ruled that even a showing that lives could be saved was insufficient successfully to overcome a suspension. Although the Department believed that it could successfully defend against the protest, it entered into a settlement with the protester under which it agreed to pay the protester $65,000 to withdraw the protest so that it could proceed with the procurement.

There is simply no reason why the decision to proceed should not be left to the agency. Agencies' judicious use of this power at the GAO, as borne out by the statistic I cited to you a moment ago, demonstrates how agencies can and do properly exercise discretion when they are empowered to make critical procurement decisions.

Second, the GSBCA review process is very costly. Because decisions are based on a newly created record, parties find themselves engaging in extensive discovery. In addition to document discovery, it is not unusual for the board to permit the exchange of hundreds of interrogatories and the deposition of dozens of witnesses on a protest of a large IT procurement.

The Air Force has estimated from recent experience that direct outlays alone to defend a very large IT procurement at the GSBCA are at least $100,000. This figure includes costs associated with expert witnesses, travel, depositions, transcripts (of depositions and the hearing), and clerical and courier services. Not included in this figure are the costs of in-house labor, both legal and non-legal, which can often rise to at least an equal sum, if not several times more. In terms of in-house legal resources, the protest of a large procurement will typically require the full time service of four government attorneys for the life of the protest. Overall, the Department of Energy estimates that the dollar cost to defend a GAO protest is roughly 15 to 40 percent of the cost of an average GSBCA protest. In a time when we are downsizing our workforce, continuation of the status quo means that a growing proportion of our procurement workforce will be lawyers defending protests.

The government must also be prepared to pay the protester's attorney and expert witness fees if the protester prevails. In a large protest with massive discovery, fees can be enormous. In successful protests filed against the Air Force between March 1990 and February 1994 on procurements over $25 million, the taxpayer has paid an average of $150,000.

There is also the monetary cost of delay in implementation of the contract—which can be significant even when a protest is not decided against the government. For example, in November 1994, the Air Force was confronted with a protest against a $150 million maintenance contract award for the National Test Facility in Colorado Springs. An extension had to be signed with the incumbent at a cost considerably higher than that which would have been paid if a contract was entered into with the awardee. If the protest had proceeded the full 64 calendar days, the interim contract would have cost the Air Force four million dollars in excess of the awardee's proposal. The protester and the awardee were able to agree on sharing the contract. Although reluctant to go along with this arrangement, the Air Force did not object because of the enormous costs that would have ensued, even if it prevailed in its protest.

In another example, the Commerce Department defended a protest against the award of a $100 million renewal contract for patent photocomposition services. An additional non-essential round of discussions was conducted with the company that eventually protested and the award decision was delayed by many weeks to make certain that Commerce could successfully defend a protest. In response to the protester's request, the Board suspended Commerce's ability to award a new contract. The new contract would have resulted in savings of approximately $50,000 per week. Consequently, even though Commerce believed they would have "won" the protest, Commerce's Patent and Trademark Office agreed to a settlement under which they paid the protester $275,000 principally to take advantage of the incumbent's lower prices under the new contract. In total, Commerce's Patent and Trademark Office estimates that the protest cost them in excess of $2 million.

The Solution Proposed by H.R. 1670

Mr. Chairman, when I look at the process proposed by H.R. 1670, I unfortunately see a potential perpetuation—and, worse, expansion—of the same practices employed by the GSBCA that are currently interfering with procurement streamlining

and draining agencies of resources they can ill afford to lose in this budget climate. Consider the following two points:

• The new United States Board of Contract Appeals (USBCA) created under the bill would have greater powers and independence than either of the current protest fora, or any of the disputes fora. The new board would increase the role of judges and of legal rules, rather than the judgment of policymakers and of good business sense, in making procurement policy. Its own rules and regulations would be exempt from review by anyone (despite the significance of such rules, which would annually affect agency conduct of procurements worth tens of billions of dollars). The Board would have power to overturn regulations developed after public notice and comment and appropriate review. The bill would seem to give the board independent authority to litigate apart from the authority of the Attorney General to represent the executive branch before the courts. This sort of extraordinary independence and litigating authority is a far cry from how these fora were originally (and rightfully) conceived—as representatives of agency heads offering an inexpensive and informal alternative to court litigation. These provisions are totally unacceptable.

• The USBCA would have at its disposal many of the intrusive powers currently possessed by the GSBCA, but with far broader jurisdiction. While we are pleased to see that the USBCA would be required to accord a presumption of correctness to facts found and determinations made by the contracting officer, it is unclear what type of deference would be afforded. For instance, the bill would permit the board to set aside an agency action found to be unwarranted by the facts to the extent that the facts are subject to trial de novo. While the intent may not be to expressly authorize de novo review, the bill clearly leaves open the possibility for a continuation of this disruptive, costly process. In addition, it appears inconsistent to give determinations of contracting officers a presumption of correctness on the one hand and deny them authority to decide whether to proceed with a procurement in the face of a protest on the other.

In addition, H.R. 1670 does not go far enough to limit the amount or type of discovery or the holding of hearings. The bill would limit discovery on protests of procurements under $1,000,000. But even there, discovery could include both document production and interrogatories, and there would be nothing to preclude a hearing. With these powers, and jurisdiction far more expansive than the GSBCA (whose authority to decide protests is limited to IT procurements), the board could cause major disruption to many more acquisitions. Given that all the protests currently taken to the GAO (roughly 90 percent of the protests brought to administrative protest fora) would come to the USBCA, and all of those above $1,000,000 would be subjected to a more complex process, any potential savings that might possibly come from consolidating the boards would be quickly overwhelmed.

It is for these reasons, Mr. Chairmen, that I strongly urge you to give careful consideration to rethinking the direction of the protest provisions in H.R. 1670.

The Administration's Solution

I believe the Administration's proposal offers an appropriate balance between the need for effective oversight and the need to ensure that program missions are not unduly disrupted. Here are the major changes we would propose:

(1) Create a bid protest review process which can ensure in a cost-effective, nonintrusive manner that incidents of arbitrary and capricious decision-making and other violations of procurement law which materially prejudice the protester are rectified. To accomplish this, we would require the fora to determine that an agency decision was unlawful only if the disappointed bidder established that it was substantially prejudiced by a decision that violated procurement law or regulation, or was arbitrary or capricious. To ensure that the cost of the process is kept to a reasonable level, we would require that decisions be made on the written record. So that the record was not one-sided, we would permit supplementation, but only with documents and only to the extent they are reasonably calculated to establish a violation of procurement law or regulation, bad faith, fraud, or the presence of a material mistake of fact in the agency record. This would emulate the discovery process used successfully by the GAO to avoid the expensive practice of expansive questioning through interrogatories and depositions which is common to protests at the GSBCA. Finally, hearings would be authorized only where the forum could not resolve the protest solely on the written record, and their scope would be limited to specific factual issues clearly defined before the hearing.

I might point out, Mr. Chairmen, that our suggestions regarding supplementation of the record were not contained in our original proposal, but have been developed by the Administration in response to concerns raised by critics regarding the fairness of the Administration's proposal.

(2) Consolidate judicial authority to resolve bid protests in the Court of Federal Claims. Currently, this court shares this authority with federal district courts. With its nationwide jurisdiction and contract expertise, the Court of Federal Claims could effectively and efficiently serve as a unified judicial forum operating in the national interest. This would avoid the unfairness of forum shopping.

I might point out that the divestiture of bid protest jurisdiction would not prevent small businesses from having their day in court. The Court of Federal Claims is authorized to hold hearings throughout the country in order to minimize inconvenience and expense to litigants. As an aside, you might also note that of the current bid protest activity taking place in the district courts, roughly half occurs in the Washington, D.C. area.

(3) Permit agencies to decide whether a procurement should proceed in the face of a protest. As I mentioned earlier, agencies are most familiar with their own programs and are in the best position to make an educated, well reasoned decision as to whether the urgency of the requirement is such that the procurement must proceed. Accordingly, we favor the current GAO practice of making suspensions of procurements automatic, and permitting the head of the procuring activity to authorize award and performance upon a showing of urgent and compelling circumstances (or, where a protest was brought after award, upon a showing that proceeding was in the best interest of the government).

(4) Cease awarding protest costs to protesters. Current practices allow contractors to charge the taxpayer for such costs if the contractor is doing cost-reimbursement business with us, even if they lose the case. I know of no other example in any legal system anywhere where the winners in court pay the legal costs of the losers! We need your support to end this abuse of taxpayer dollars.

I also understand, Mr. Chairman, that the ABA may propose the elimination of any payment of bid protest costs except in the case of successful protests by small businesses. We would strongly support this proposal. We have always been concerned that the one-sided nature of the current set-up—where prevailing protesters may recover their costs and fees but the government may not recover its expenses when it prevails—induces litigation.

CONCLUSION

Mr. Chairmen, Congresswoman Collins, and Congressman Dellums, I greatly appreciate the support you have given to making procurement reform a reality. I particularly appreciate—and I believe the American people appreciate—our ability to work together on this issue for the public good. I equally appreciate your recognition that more needs to be done. I cannot emphasize enough how crucial additional reform is.

In the bid protest area, we have shown a willingness to search for a solution acceptable to the widest possible range of participants in the process. Such a solution must involve meaningful reform; it must not move backward. The Administration seeks to cooperate with you in our joint and ongoing effort to bring about lasting changes.

Mr. CLINGER. Thank you, Steve. We certainly want to work with you as well. We are not looking at this as an adversarial relationship. We are trying to reach the same goals.

Let me ask you, some of the previous panelists talked about the ability that the Government now has to narrow the players, to limit competition, and said that we didn't really need to do anything beyond what is available now. The question is, are you permitted under the current full and open competition standard to in fact eliminate from the competitive range the firms that do not have a real chance for awards? We don't think you do, but——

Mr. KELMAN. In the current process, we do have an ability after going through lengthy proposals and lengthy evaluations of often multi-thousand page proposals to somewhat limit down a competitive range after we have gone through a lot of bid and proposal costs for the offerors.

Mr. CLINGER. That would buttress what was said earlier, that the decision to eliminate comes pretty far down——

Mr. KELMAN. It comes very far down the process and, also, we are very hesitant to use it because the statutory and regulatory environment and the fear of protests. Perhaps the Colonel might want to address that if he is willing to, but I think it is fair to say, having talked to a lot of contracting officers, that people are very, very hesitant to cut down the competitive range very much.

So we have a situation where you get in maybe 10 bidders, we go through all this evaluation and then reduce the competitive range to 7 or 8. As you know, the administration's bill had addressed that issue by asking for specific statutory authorization to make more efficient decisions on the competitive range. Your bill addresses that problem in a different way.

Mr. CLINGER. Colonel Case.

Colonel CASE. I would second what Steve said. I already mentioned that the pervasive fear of protest causes a lot of focus on what action causes a protest, and I have sat through many competitive range discussions and if there is—in environments where there might be otherwise a decision to remove someone from the competitive range, I believe that there is frequently a decision made not to, because of the fear that that would cause a protest at that point, which would further delay the procurement.

An added side effect of that is that at competitive range, we still have not had—that is the point at which generally a procurement would open discussions. You would then have further discussions with the offerors and then you have additional offer from those offerors. Generally it would be a best and final offer, but sometimes there is an intermediate round of offers and each of those offers has to be evaluated.

So by not pruning the competitive range, we also subjected ourselves to more proposals to reevaluate and a longer evaluation process, because it is not done at that point.

Mr. CLINGER. Clearly, our intent in what we are trying to accomplish with this legislation is that the combination of the new competition standard which we have in Title I and the use of simplified procedures for commercial acquisitions which is contained in Title II would result in more streamlined acquisition procedures, and ultimately, in fewer protests.

Would you agree that that would be the result? Do you think that we would, by the combination of those two things, actually result in fewer protests?

Mr. KELMAN. I think what we are worried about, Mr. Chairman, is that the fact that we are taking various procedures, extensive discovery, depositions, interrogatories, hearings and so forth, and extending their applicability beyond the 10 percent of Government procurement where they now are limited to and extend it out to the other 90 percent of Government procurement, that on balance, this is going to lead to more litigation and more intrusive litigation. So we are just very fearful that the right balance here, you know, just hasn't been struck unfortunately.

Mr. CLINGER. We considered language when we were drafting this bill which would have required you, the Government, to undertake an assessment of the appropriate acquisition work force, in light of the changes being made in the procurement system.

We didn't include that language in the bill as introduced. Do you believe that the acquisition workforce will, in fact, change and downsize as a result of—whatever streamlined and simplified procedures are implemented in this bill, as well as what are included in FASA.

Mr. KELMAN. Well, one of the reasons we need procurement streamlining so badly is that the downsizing is going to occur whether or not we change the procurement system. So the question is, can we reengineer and reinvent our processes with your help and with the help of our own managers and our own internal work so that we don't destroy the way the procurement system works and its ability to deliver any sort of value to the taxpayer.

We are very interested—we have been working with Congresswoman Maloney on some language on the acquisition workforce. We realize there is a problem because of the very, very tight budget environment. I think that we have a responsibility to try to come up with reinvented methods of training, and right now, a lot of times when we train people, we send them off to, you know, off to a hotel for 2 weeks or something like that, you know, offsite and so forth.

I think we need in the executive branch to take advantage of more modern training techniques, you know, distance learning, some of the kinds of things perhaps Chairman Horn worked on as a university president in his previous incarnation.

But I think—we agree with Congressman Maloney that in an environment where we are trying to give more freedom for the Elizabeth Salihs and the Barry Cases of the world to use good business judgment. We also need to give them the environment where we give those people the kind of training they need.

Mr. CLINGER. Clearly, our bill would place a lot more responsibility on the contracting officers and contracting agencies. We really do feel that those kinds of decisions, as to who is going to be involved in the bidding pool, are better made at that level than here, with us micromanaging how that would be done. So clearly training would have to be a very essential part of that exercise.

Let me ask just one more question on behalf of Chairman Spence. Given the increased discretion that this bill will be granting to contracting officials, will you be inclined or would it be an inclination to award more sole-source contracts?

Mr. KELMAN. I think we have to take every step at our disposal in regulations, through training, with statutory direction if need be, to make sure that that doesn't occur. I think that the achievement of the Competition and Contracting Act of 1984 was to bring about a genuine decline in the number of sole source awards. And I don't think we want to—we should recognize that achievement, even as we move forward.

I mean, sometimes there is a tendency among some of the participants I think in this debate to think that either we have, you know, the Competition and Contracting Act of 1984 or we have some either bad or good old days, depending on your perspective or whatever. Maybe I am just more optimistic person by nature. I just think we have learned things over time, and I think that as we fashion a reinvented procurement system, we ought to be looking at the undeniable achievement of the Competition and Con-

tracting Act in reducing sole-source awards, but try to get rid of the environment of bureaucracy, multi-thousand-page proposals, litigation and so forth that has been spawned in the environment of the Competition and Contracting Act.

Mr. CLINGER. Just very briefly, can you categorize the kind of comments that you have been receiving on the draft proposals?

Mr. KELMAN. Well, I think that it is—most of the executive branch agencies are—I carefully chose the word intrigued. I think they are intrigued. They certainly—I think they see this as a very positive statement by Congress that we are really interested in fundamental change, and I think there is a lot of energy within the system for real improvement and real change.

And so whether—you know, what people would think of the different—the dotting i's, crossing t's and so forth. I think in terms of the overall vision of a reinvented procurement system, there is a lot of enthusiasm. We have gotten some comments from the Justice Department on some of the issues involving the procurement integrity language and the Justice Department supports almost everything in H.R. 1670 with one exception: They believe that the standards of proof that have been outlined in H.R. 1670 are knowingly and willfully. The Justice Department believes that those are in essence impossible to meet. And they in the administration urge you to change that standard to a knowingly standard from a knowingly and willfully.

The agencies, as are we, it comes as no surprise to you, and I have used moderate language compared to some of the things I have been hearing, I assure you, about some of the provisions regarding the protest.

Mr. CLINGER. My time is up, but I did want to ask Captain Cohen what the reaction of DOD has been?

Captain COHEN. Toward the whole bill, or toward any specific provisions?

Mr. CLINGER. About your reaction to the FARA.

Captain COHEN. To your bill as a whole?

Mr. CLINGER. Right.

Captain COHEN. I think there has been some indication that people are appreciative of the attempt to make some meaningful change. There has also been concern that in doing so, it is critical that we retain the integrity of the system and that we do nothing to change the appearance that people in and outside of the system have a fair deal and a fair shake. So however we implement any of the provisions here, it has to be done in a way which preserves that integrity of the system.

There are some other concerns. I think Steve has characterized them with respect to the bid protest area and the disputes area. We—I think—would take the position that we are opposed to the combination of the disputes and the protest areas, and that some of those decisions are much better retained at the agency level. Not that we don't believe that there needs to be change in this process, but we don't think this is the proper change.

Mr. CLINGER. Thank you.

Mrs. Maloney.

Mrs. MALONEY. Thank you very much.

Mr. Kelman, do you know how many sole-source contracts we now have in Government? Is there a tracking system of it?

Mr. KELMAN. Yes, there is a tracking system. I don't know the number. The number is actually a fairly small number of the total procurements. It runs about I believe in the neighborhood of 30 percent of the procurement dollars, and that is mostly follow-on—most of that today is follow-on contracts within DOD of sort of further levels, you know, second, third generation production of major weapons systems that were initially competed, but when we go to the follow-on work, we stay with one supplier.

Mrs. MALONEY. Does the administration support H.R. 1670's repeal of the standard of full and open competition for a new standard of maximum practicable competition?

Mr. KELMAN. Congresswoman Maloney, I chose my words in my statement very carefully.

Mrs. MALONEY. That is why I am asking the question. I couldn't figure out what your position was.

Mr. KELMAN. I chose them carefully because I think to some extent these different words are about signals we send in the process. I think that the achievement of the Competition and Contracting Act was to send a signal through the words full and open competition of saying, we don't like sole-source procurements. And that signal was heard, and I think it achieved improvements in the system and I think everybody should be grateful that we achieved those improvements.

I believe that the words that have been chosen in H.R. 1670 are designed to send a signal to the system that we need to shake it up. It has become too bureaucratic. It has become too constrained. There is too much nonvalue-added features of the system that don't provide quality for the taxpayer and that we simply can't afford any more.

We don't have—we have a strong position saying we would like to see the system de-bureaucratized and deregulated. As you know, the administration presented some language on our specific suggestions. As you also know, there is a Senate as well as a House.

We see H.R. 1670 as a very good jump start to achieving genuine procurement reform this year, but there will be a lot of time to talk about some of the specific issues of what the exact standards should be and so forth. But we do applaud the fact that this bill has caught the attention of the system, shaken us up, we like being shakened up, and is trying to move the system forward in a progressive direction.

Mrs. MALONEY. Could you elaborate—everybody realizes that the bid protest is a problem, and yet many of you indicated that the proposal in H.R. 1670 was inappropriate for various reasons. How do you suggest that the bid protest problem should be handled?

Mr. KELMAN. Well, as you know, the administration developed a position on this issue earlier. We have been trying to work in the interests of seeing something that we can get the broadest possible consensus toward on a compromise position.

I think what we have heard—we have heard the critics of our earlier position who said, "Gee, the administration's position only allows the agency to supplement the record; it might not allow any production of documents at all." So we have said:

OK, let's allow some limited supplementation of the record in writing by a protestor or by the agency; let's allow some controlled and limited document discovery; let's get rid of how many boxes—250,000 pieces of paper in a bid protest file, renting trucks; let's get rid of the unlimited document discovery that exists now, and let's get rid of this adversarial and destructive presence of interrogatories and depositions which poisons any ability of contractors and the Government to work together as partners.

Let's also set up a clear and deferential APA-based standard for judging whether the agency's action should be upheld or not, one that does not require a standard of perfection and that awards a proper deference to the business judgment of the Government.

Let me just say, if I could also say, we have also asked for just quickly an end to the abuse on allowing people who sue the Government to get their costs for suing the Government as well as a number of other changes.

Mrs. MALONEY. In the administration bill, it was put forward to limit the competitive range to as few as three competitors. For what reason did you want to limit the number of competitors? After hearing some of the testimony that we heard today, do you still think that is a good idea to limit?

Mr. KELMAN. Well, the competitive—the way we do the competitive range, it is not three competitors up front. The competitive range determination, as Colonel Case indicated, takes place well into the current process. We have already gotten a large number of proposals. Those are often incredibly lengthy in our current system and require incredibly detailed evaluation, perhaps hiring consultants to do a best value evaluation to protest prove the procurement and so forth.

Only after that very lengthy evaluation are we allowed to get rid of anyone at all. Even then, for the reasons that we have indicated, the Government has been extremely cautious to even after all of that evaluation, to down-select at all. So we were trying to address that nonvalue-added feature of the process where we continue to undergo or undertake negotiations with a significant number of offerors who have no realistic chance of getting the awards, even after we have looked and evaluated their proposals at great length.

Mrs. MALONEY. Well, Colonel Case made very strong points on the disincentive to exclude anyone from the system. Possibly we need very strong language or very clear language that certain criteria should be met and then you tell them that they haven't met it, and if they want to continue, fine, but—at the beginning of the process.

Mr. KELMAN. I think your words at the beginning of the process are really a good idea and they echo some of the comments that the ARWG panel and the other panelists made before.

If I could say, my own personal position of the procurement system is one where it is easy to get your foot in the door. It should be easy to get considered, but that before you have spent a lot of bid and proposal costs, before the Government has gone through an enormous bureaucratic windmill and paper exercise of extensive evaluation, that the Government tell you early on, sorry, this time it is not going to be right, please come back next time.

It would be easy to get considered—that consideration be very brief and streamlined and at that point the Government have a much easier time down-selecting. But we do need statutory and

regulatory protection to allow us to do that, or else no one is going to take up that authority, because they will be afraid that someone is going to go protest them.

So I mean I agree with what you are suggesting, what some of the industry people suggested before, but we need statutory protection and protection against some of the excessive intrusiveness in the bid protest system to allow that vision to be realized.

Mrs. MALONEY. Thank you very much and thank you very much for your testimony, and your really outstanding work in this area.

Mr. KELMAN. Thank you.

Mr. HORN [presiding]. I thank all of you for the excellent testimony you have given. I am particularly impressed with the testimony of the two procurement officers.

Captain Cohen, may I assume that you have also been a procurement officer?

Captain COHEN. Yes, I have.

Mr. HORN. Good. Some of the questions I am going to ask then, you can all three answer.

But first, Captain Cohen, let me clarify some of the exchange you had with Chairman Clinger. I wasn't quite clear the degree to which the Department of Defense supported the maximum practicable competition standard in lieu of the full and open competition standard.

As I look at the testimony which we have included in the record of Deputy Under Secretary of Defense—Acquisition Reform Preston, I find the following:

> The DOD applauds this effort to recognize that Government can no longer afford, in administrative burden, to meet the requirement that every potential Government source must be allowed to compete, even when not all of those sources have a realistic chance of receiving the Government contract. As budgets face greater decline, some tradeoff must be permitted between allowing every potential offeror to compete and requiring only a number sufficient to ensure competition and efficient procurement of high quality goods and service.

And then it goes on, "DOD strongly supports a uniform notice posting threshold for all executive agencies as there is no rational basis to distinguish among agencies on this issue."

That is the formal comment coming back. And I just wanted to make very sure, how do people really feel in the Department of Defense on the maximum practicable competition standard?

Captain COHEN. Well, if I could elaborate a little bit. I think that the wording itself is of concern. We don't know exactly what that means, and the comments that we received when we asked the agencies, the defense agencies, to comment were: what does that mean? What extent do we have the authority to remove sources at the very outset, and what are the restrictions we have on including sources at the outset? So I think the terminology itself is a problem, and it would require very, very detailed implementation if it were left as it now stands.

I think the Department takes the same position, as you have heard from Dr. Kelman with respect to the change from full and open to any other standard. And I think we are supportive of the concept and recognition that full and open is not necessarily the most, or only, effective way, but we do not have an alternative that we are willing to propose at this point.

Mr. HORN. Well, that is a good point and I think we ought to give it a little more clarification which would help guide us. One of the problems that you hear in all of this exchange, and your experience, which is more than any of the rest of us in this room, is that sometimes we bend over backward to be very precise, very worried about the rights of all parties, and we are sort of dealing with the lowest common denominator in a sense, which restricts a lot of very able people from doing their job. So let me ask you a few questions just as to your own experience as procurement officers.

Have you seen in your experience as a procurement officer situations where the bid protestor who did not win the award is protesting primarily in the hope that that individual will be either a subcontractor for the winner to do part of the work or not? Do you see that at all as a motive for bid protest?

Captain COHEN. In my experience, I haven't identified that as a purpose of protesting.

Mr. HORN. Colonel Case, how about you?

Colonel CASE. I am aware of some cases where the protestor—and it is difficult to judge what the motive was—but the protest was settled by simply agreeing to give that protestor some part of the business.

Mr. HORN. I have seen that in State contracts. That is why I raised the question.

Colonel CASE. I have seen it frequently. Whether that is the motive for the protest or not, I wouldn't care to speculate.

Mr. HORN. Ms. Salih.

Ms. SALIH. I haven't had that experience—and I agree—with not knowing whether that is why they protest; however, I agree that there are a lot of settlements, and I think contractors know that when they protest.

Mr. KELMAN. If I could just add, the computer press has reported on three examples just in the last few months of situations exactly like you describe where the protestor has withdrawn their protest and been given a share of the work by the awardee.

Mr. HORN. Now, is that a problem we should address in legislation? Should they be just ruled out from doing that? I mean, obviously some of us think that helps encourage bid protests, to tie the place in knots, get a piece of the action, make everybody's life miserable in order to achieve that goal.

What is the feeling on that? Does the administration have an immediate position, or do we need those consultative groups and more bureaucracy for Dr. Kelman's voice?

Mr. KELMAN. I am going to use my favorite word today: "intriguing."

Mr. HORN. As a former professor, I would sometimes say "interesting," which equals a C. What does intriguing equal?

Mr. KELMAN. B minus. Actually maybe higher than B minus.

Mr. HORN. Well, that is an Ivy League grading standard.

OK. So besides intriguing, what can you say on the subject, and would you find maximum practicable intriguing, or is there another standard?

Mr. KELMAN. I clearly believe that it is an abuse of the protest process to have a situation where a protestor, in effect, whatever

their motives, are able to blackmail or, you know, extort the system to share the work with a, you know, with a winning vendor.

And my quick reaction, without consulting my lawyers, as a non-lawyer, is that if there is a way to craft feasible statutory language to deal with that abuse, I think we ought to very seriously consider it. Without going through a lot of bureaucracy, we will get back to you very shortly on that.

Mr. HORN. Thank you.

Mr. Chairman, I have just one question in the next round to ask, and I leave it to your discretion.

Mr. CLINGER. Go ahead.

Mr. HORN. My last question would be simply this. You obviously are three outstanding procurement officers by profession or you wouldn't be here.

What can be said about cases you have heard of by colleagues that share your profession in terms of role, function and so forth, that we need to worry about that aren't really covered by laws and that you have seen something you just felt was simply unfair, unethical in the way an award was made.

What sort of things have bothered you as professionals that you have seen other people do that you don't think is important to the profession itself? I mean, there is no question about it. You are handling millions, billions of dollars of purchases on behalf of the taxpayer. What should Members of Congress be worrying about?

Captain COHEN. I would say that if I could bring up anything at all that would fit that, it would be determinations made to settle disputes that I have felt should have been carried farther down the process. And there have been situations in which we have received advice from various legal, I guess, agencies within the Government to do that. And I have felt that in some cases we should have proceeded with our decision and stuck by our guns. Other than that, I can't think of anything offhand.

Mr. HORN. Was there a political motive besides those—behind those agencies in Government why they wanted a settlement? Or did they just want to clear the deck?

Captain COHEN. It was a matter of litigation risk which I disagreed with and the amount of dollar value return for the amount of cost associated with pursuing it.

Mr. HORN. I had the same problem with the State officials for the State Department of Justice who just want to usually clear the deck, and I fortunately had the power to say, if my signature isn't on there, you can't clear the deck.

And I just wonder how that balance of power works in the Department of Defense. Could the appropriate official in defense, perhaps Ms. Preston, refuse to sign off on that and have them continue the action?

Captain COHEN. I don't know the answer to that.

Mr. HORN. We might want staff to find that out, because that process does occur in all bureaucracies where the lawyers sometimes say, "Hey, if we go into court on this one, we might lose more." But the fact is, if you go into court on that one, you will stop bad behavior when you start winning a few, and it then cleans up the process a little. But it is just a matter, as you suggest, Captain, of taking the risk.

Colonel CASE. I tend to agree with those comments. We frequently wind up settling out of I guess what I might characterize as fear of what the court will do, if it is carried to its conclusion. Notwithstanding the fact that I know the GSBCA process is not advertised as doing so, there is a perception that the GSBCA substitutes their subjective judgment for that of the source selection authority, rather than strictly, you know, reviewing the very, very extensive facts, and I think it is that comprehensive, detailed, as I indicated earlier, anguishing process that just, that there are decisions made to avoid the process to the maximum extent one can.

Mr. HORN. Ms. Salih.

Ms. SALIH. I agree with the comments that have been made, and in fact I can give you a little bit of an example that I have personally been involved in.

We had a contractor that was supposed to start work at a specific point in time, and a few days before he was to start to work, he called and said, "I am not going to perform." I asked him if he was willing to put that in writing. He did so, sent it to me saying, I am not going to perform under this contract. We terminated for default and under excess cost—when we assessed the excess cost to the firm, he came in and said, I am not going to pay these costs.

We, out of fear of what the de novo review of GSBCA and some of the other things that have been said about that particular body, we were advised that the best thing to do, because we didn't know how it would go in court, even with the contractor giving us written documentation that he was not going to perform, given that GSBCA might change the termination for default to termination for convenience; we needed to settle, and that is what we did.

Mr. HORN. That is a good example of what is wrong in the system. We need to back up good people like you and not undercut you, because all we have done is undercut the taxpayers, undercut the Government, undercut quality procurement, and it makes you sick when you hear those cases, but I am glad to hear the responses all three of you gave.

Thank you, Mr. Chairman.

Mr. CLINGER. Thank you.

Mrs. Maloney.

Mrs. MALONEY. Yes. Thank you, Mr. Chairman.

Very briefly, Colonel Case and Captain Cohen, H.R. 1670 calls for the consolidation of several administrative tribunals and the bid protest and dispute resolutions folded into a single board. What do you see as the advantages of this consolidation? Are there any advantages that you see in having two boards, one for military procurement and one for civilian procurement?

Captain COHEN. I am not sure that I can identify any advantages to the combination as it is proposed. I would say, as I mentioned earlier, that the concept of protest and disputes are two separate techniques and they probably should be separated and conducted in a different body, or a different forum.

We are concerned that in the combination that is proposed, the Secretary of the department, whether it is defense or any other, would lose the authority to oversee the procurement functions that he is tasked or responsible for, and that we ought to be pushing downwards rather than upwards the resolution through alternate

disputes forums, and if necessary through a more formal forum, but that should be pushed down to the lowest level possible rather than bringing it up to the highest level possible.

Mrs. MALONEY. Do you think that there should be two boards, one more military procurement and one for civilian procurement?

Captain COHEN. Of appeals for contract appeals?

Mrs. MALONEY. Yes.

Captain COHEN. I think so.

Mrs. MALONEY. OK. Colonel, would you like to add anything?

Colonel CASE. Well, quite candidly I have not had a chance to review the detailed languages in H.R. 1670, so I am not completely familiar with the construct of the proposed new board. My understanding is that this is a forum that is—that largely modeled, in terms of its processes and procedures over the GSBCA, some of the GSBCA rules and regulations, which is why I think I was asked to make some statement regarding the experiences I have had with that forum.

Mrs. MALONEY. Captain Cohen, in previous testimony before this committee, Deputy Under Secretary Coleen Preston stated that FASA provides about 95 percent of what DOD needs to reform its procurement process. Is that still DOD's position?

Captain COHEN. I haven't talked to her about the number recently, but my sense is that we are well on our way. The implementation process is moving ahead and we will be seeing some action, and I think it is going to go an awful long way. But I do think some of the provisions here proposed or modification of these will be very, very helpful. Whether it is 5 percent, I can't answer that.

Mrs. MALONEY. Is H.R. 1670 necessary to achieve what she described as the additional 5 percent needed to complete DOD's procurement reform?

Captain COHEN. I am not sure that it represents the exact fashion that she would have used for that 5 percent, but I think she believes that a bill of this nature is certainly going to be beneficial to us.

Mrs. MALONEY. Is there anything that she or you would like to add to this bill that is needed for reform in DOD?

Captain COHEN. I think you will find in her prepared testimony, there is a series of provisions which are ones that have been provided in other drafts to the Congress.

Mrs. MALONEY. OK.

Captain COHEN. I think if you took a look at those you would find a number of provisions which she would feel are important and urgent.

Mrs. MALONEY. Thank you very much.

And thank you, Mr. Chairman.

Mr. CLINGER. Thank you, Mrs. Maloney.

I want to thank the panel for their testimony today. I must say I am a tad disappointed in two measures. One is that in the bid protest issue we tried to fashion in this legislation in a sensible middle ground. We certainly didn't give the Government everything it wanted. We certainly didn't pander to the suppliers.

We tried to strike a middle ground, and I would hope that we can work together on that issue. We would like you to be excited

about what we have provided. You are obviously not at the moment and that does disappoint me.

Second, I think you indicated, Mr. Kelman, you were intrigued by our change in terms of competition, the definition of competition, and yet because we are really trying to give you the flexibility that I think you want, and yet I didn't get the sense somehow that there was a lot of excitement about accepting that responsibility, and again, that disappointed me.

Mr. KELMAN. Let me just comment on the second briefly, which is that we think that the bill in Title I and Title II—first of all, I didn't talk about Title II. I didn't speak about it. It is in my written testimony. We are very enthusiastic about Title II.

Title I, we think is a very exciting sort of statement and vision. Is it exactly the right words? We want to keep talking about that. But we are very strongly supportive of the direction in which you are trying to move in Title I, very supportive and very enthusiastic, that is to say, toward a streamlined, commercial-style, value-added competition.

So I hope my remarks—if my remarks did not signify, let me take this last moment to say that we are enthusiastic about the direction in which you are going. We just have to talk about the specific words.

Mr. CLINGER. Those are the words I like to hear, enthusiasm. Thank you.

Colonel CASE. I would just like to reemphasize that. I am excited that there is clear action to reform the protest process which absolutely needs to be reformed. I think it is just a matter of the specifics.

Mr. CLINGER. OK. So we close on excitement and enthusiasm. Thank you.

[The prepared statement of Ms. Preston follows:]

PREPARED STATEMENT OF COLLEEN PRESTON, DEPUTY UNDER SECRETARY OF DEFENSE—ACQUISITION REFORM, DEPARTMENT OF DEFENSE

Mr. Chairman, Representative Collins, Mr. Chairman, Representative Dellums, and Members of the Committees, I am pleased to offer my comments concerning H.R. 1670, the Bill entitled "The Federal Acquisition Reform Act of 1995."

Fundamentally, this Bill offers much of the statutory relief that we need to continue the aggressive re-engineering process that we have started. The passage of the 1994 Federal Acquisition Streamlining Act gave us expanded authority to re-engineer the acquisition process and adopt the acquisition processes of world class customers and suppliers. This legislation combined with the on-going initiatives that the Department is pursuing—both centrally, within each of the Services and Defense agencies, and at the local level—will begin institutionalizing a new acquisition process that will increase our efficiency and effectiveness. You have now offered a Bill that will remove most of the remaining legislative impediments that prevent us from becoming world class purchasers. Consequently, with the exception of the protest provisions, I believe this Bill has the potential to make significant improvements in the way the Government does business. By striking now you maintain the momentum of acquisition reform and make a meaningful contribution to creating an acquisition system that gets out in front of the new national security challenges instead of reacting to them. We must never forget that the primary mission of the acquisition system is to meet the war-fighter's needs—our men and women in uniform deserve nothing less than a team effort supporting them.

I have divided my statement into two portions: a discussion of the specific provisions of this legislation, and a brief summary of key provisions that were included in the Administration and Defense proposals submitted to the Congress earlier this year that and would be appropriate for consideration as potential additions to this Bill.

First, I want to review the Bill's provisions with an eye toward identifying what I believe is the intended result of each section, followed by my comments on the proposed section. In cases where I think there might be a better way to achieve the same goal, I'll provide a brief discussion of an alternative approach.

I would like to offer the following comments on specific provisions of H.R. 1670, as introduced May 18, 1995, by the Chair of this Committee:

I. COMMENTS ON H.R. 1670 "THE FEDERAL ACQUISITION REFORM ACT OF 1995"

Competition

Would substitute "Maximum Practicable Competition" for "Full and Open Competition;" allowing any combination of competitive procedures best suited for any particular procurement (including the exclusion of a particular source when necessary), eliminating the exceptions to full and open competition since they are no longer needed; would define new standard as "as the maximum number of responsible sources that are permitted to bid on a government proposal;" would authorize agencies to award a contract after discussions with some, but not necessarily all, responsible offerors. (sections 101, 102 and 103)

The section would eliminate the preference for sealed bid contracting over competitive negotiation. It would conform the procurement notice posting threshold for all executive agencies to $10,000 (currently, DoD has a unique threshold of $5,000), and eliminate duplicative notice provisions.

INTENDED RESULT: To simplify the acquisition process by eliminating the complicated set of rules that govern when an procurement may be made without full and open competition.

DoD COMMENTS: DoD applauds this effort to recognize that government can no longer afford, in administrative burden, to meet the requirement that every potential government source must be allowed to compete, even when not all of those sources have a realistic chance of receiving the government contract. As budgets face greater decline, some tradeoff must be permitted between allowing every potential offeror to compete and requiring only a number sufficient to ensure competition and efficient procurement of high quality goods and services.

DoD strongly supports a uniform notice posting threshold for all executive agencies as there is no rational basis to distinguish among agencies on this issue.

ALTERNATIVE SOLUTION: None.

Would require a contractor to request a debriefing within 3 days of being cut from a competitive range or lose the right to receive a post award debriefing but allow the agency to retain the discretion to grant the preaward debriefing request or not. (Section 104)

INTENDED RESULT: To improve the acquisition process by requiring a contractor eliminated from the competitive range to timely request a debriefing, rather than waiting until after award to request a debriefing and thereby forcing the agency to recreate, some months after the fact, the competitive range cut decision.

DoD COMMENTS: Support. Requiring debriefing requests following the competitive range determination permits more informed debriefing because the deficiencies in the offerors' proposals are fresh in the minds of the government evaluators. There is also a natural hiatus in the Source Selection process shortly after the competitive range decision, and, therefore, the team members are free to do debriefings at this time. Further, the offerors who are eliminated have timely disclosure and can promptly apply the lessons learned from the debriefings to correct weaknesses in other proposal efforts.

ALTERNATIVE SOLUTION: None.

Would allow contract type and fees to be governed by market conditions, established commercial practice and sound business judgment by eliminating inflexible statutory fee limits on cost type contracts and deleting a requirement that cost type contractors notify the government of any cost plus fixed fee subcontracts or any subcontract or order valued over the Simplified Acquisition Threshold or over 5% of the cost of the prime contract. (Section 105)

INTENDED RESULT: To further the commercialization of the government's acquisition process by permitting the contracting officer the discretion to select contract type and fee limits, given the unique characteristics of any particular procurement. It is unclear what the intended result of the proposed repeal of the prohibition on contingent fees (subsection (b)) is, except to perhaps remove a government contract unique requirement. The repeal of the requirement for the contractor to notify the government when certain kinds of subcontracts are let apparently is intended to

more closely align government contracting practice to that of the commercial sector (where less oversight is exercised over the prime/sub relationship).

DoD COMMENTS: Support the proposed repeal of subsection (d), setting forth fee limits on certain types of contracts. The law should give the contracting officer flexibility to determine the reasonableness of a contractor's fee given the particular circumstances of that contract by repealing existing fee limits on specified types of contracts, and the 6% fee limit on architect-engineering services contracts (fee limits discourage potential competitors and are a disincentive to providing high quality services; for example, in A&E contracts, it indirectly leads to higher negotiated prices and encourages reliance on standard designs, leading to increased contract modifications, protests, repairs and maintenance; also results in increased administrative burden because of requirement to track costs subject to limit). DoD also supports the conforming amendment to architect-engineering authority to add civil works-related procurement authority.

ALTERNATIVE SOLUTION: None.

Would establish a new contractor verification system to replace existing quality assurance statutory requirements. (Section 106)

Under existing law, an agency head must justify use of such a requirement and ensure that a contractor has adequate opportunity to meet such requirements where they exist. No potential offeror may be denied an opportunity to compete because they are not on a qualified bidder's list where they could otherwise meet the requirements of the product, as long as that the procurement is not delayed by providing this opportunity.

Under the proposed law, a "verification" system would be established, for repetitive buys, to verify the relative efficiency, effectiveness of a contractor's business practices and quality levels.

INTENDED RESULT: To promote the use of a qualified manufacturer's type of list for certain repetitive agency buys that ensures both quality of product and of contractor performance.

DoD COMMENTS: Support the repeal of § 2319.

ALTERNATIVE SOLUTION: None.

Commercial Items

Would enact clear commercial item exception to requirement for cost or pricing data and further limit agency ability to obtain other information when cost or pricing data is not required; would eliminate any audit right on commercial item buys (Section 201); would make cost accounting standards inapplicable to contracts and subcontracts for commercial items. (Section 204)

INTENDED RESULT: To remove barrier to commercial vendors' ability and inclination to do business with the government by creating a clear and unambiguous commercial item TINA and CAS exception for contracts, subcontracts or modifications of contracts and subcontracts regardless of threshold or competition.

DoD COMMENTS: Support the wholesale commercial item exception from TINA requirements and the deletion of audit rights for commercial item buys.

ALTERNATIVE SOLUTION: None.

Would allow special simplified procedures be utilized in the acquisition of commercial items at any dollar amount. (Section 202)

INTENDED RESULT: To allow purchases of commercial item using simplified procedures at any dollar amount.

DoD COMMENTS: Support.

ALTERNATIVE SOLUTION: None.

Would eliminate the requirement that the acquisition of commercial services be limited to those services based on "catalog" prices. (Section 203)

INTENDED RESULT: To permit the competitive procurement of commercial services based on established prices set in the marketplace.

DoD COMMENTS: Support the elimination of restrictive catalog price limitations in the acquisition of commercial services.

ALTERNATIVE SOLUTION: None.

Additional Reform Provisions

Would set forth a clear policy of Government reliance on the private sector to supply to products and services the Federal government needs. (Section 301)

INTENDED RESULT: To maximize use of private sector sources.

DoD COMMENTS: Concur. It should be noted that title 10, U.S. Code (10 U.S.C. 2461–69), contains language that prevents the DoD from fully meeting the intent of this provision.

ALTERNATIVE SOLUTION: Amend title 10 sections to ensure full conformity with this policy statement.

Would eliminate certain certification requirements

This section would: Eliminate certification requirements in requests for equitable adjustments (10 U.S.C. 2410), the bar on lobbying with government contract funds, contractor inventory accounting systems, and drug-free workplace compliance. Provides that prospective certifications initiated by any executive agency, without statutory bases, must be removed by the Administrator, Office of Federal Procurement Policy, unless a written justification provided by the agency is approved by the Administration.

INTENDED RESULT: To facilitate commercial participation in the government market by eliminating non-value added certifications; to ensure that future agency certification requirements do not recreate similar barriers to commercial businesses.

DoD COMMENTS: Concur with deletion of specific certifications. Support vesting agency heads with nondelegable authority to decide, in a separate determination, when agencies may impose such certifications in the future.

ALTERNATIVE SOLUTION: Modify language as proposed above.

Would expand authority to conduct certain tests of procurement procedures to permit procurement test programs to use new authority of Federal Acquisition Streamlining Act of 1994 without having to wait upon full implementation of that legislation. (Section 303)

INTENDED RESULT: To facilitate innovative procurement techniques.

DoD COMMENTS: Support.

ALTERNATIVE SOLUTION: None.

Would repeal provision of Arms Export Control Act requiring recoupment of non-recurring research and development charges for products sold through the foreign military sales program. (Section 304)

INTENDED RESULT: To complete the elimination of nonrecurring cost recoupment requirements on U.S. military sales to foreign countries and restore a consistent nonrecurring cost recoupment policy for foreign military sales and direct commercial sales; to assist efforts by defense oriented companies to shift toward commercial activities by eliminating a major barrier to the global competitiveness of the U.S. economy.

DoD COMMENTS: Repeal of the provision in 22 U.S.C. 2761(e) concerning recoupment of non-recurring research and development charges would increase U.S. competitiveness in global markets and enhance the national security and industrial base.

ALTERNATIVE SOLUTION: None. Ensure that provision is applied prospectively only.

Would amend procurement integrity laws to remove limitations directed at type of position and redirect restrictions to type of information sought to be controlled. Eliminate post-employment restrictions. (Section 305)

INTENDED RESULT: To clarify conflicting and difficult to enforce integrity requirements with uniform, rational limitation that prohibits disclosure and receipt of procurement sensitive information; to delete employment restrictions that are redundant of other laws and that chill ability and desire of qualified individuals to seek employment with the government.

DoD COMMENTS: Strongly support procurement integrity amendments.

ALTERNATIVE SOLUTION: None.

STREAMLINING OF DISPUTE RESOLUTION

Would establish new, unified executive branch agency to review all protests and contract claims (Section 401 would define the terms "Board," "Board Judge," "Chairman," "executive agency," "alternative means of dispute resolution," "protest," "interested party," and "prevailing party;" Section 411 would establish the Board as an independent entity within the Executive Branch; Section 412 would provide that members of the Board shall be appointed by its Chairman, and serve as administrative law judges do elsewhere in the executive branch. Section 416 would direct the Chairman to cause a Seal for the Board to be made. Section 417 would authorize the appropriation of funds to carry out these sections establishing the Board; Section 423 would provide the Board with jurisdiction of claims arising under the Contract Disputes Act of 1978; Section 431 would repeal underlying protest and dispute review authority of existing fora; Section 441 would transfer assets of existing protest and claims fora to the proposed new unified Board; Section 442 would terminate the existing boards of contract appeals but preserve their authority for existing disputes currently pending

before them; Section 443 would make technical, conforming amendments to the Contract Disputes Act of 1978; Section 444 would make technical, conforming amendments to any other provision of law; Section 445 would make technical, conforming amendments to 5 U.S.C. 5372a, 10 U.S.C. 2305, and 31 U.S.C. 3554; Section 451 would provide that this title takes effect on October 1, 1996. Section 452 would provide that the current chairman of the board of the GSBCA would serve as an interim chair of the new unified Board for a two year period; Section 453 would provide that current GSBCA rules shall be effective for the new, unified Board until that Board can implement new rules.)

INTENDED RESULT: To create a single entity, the U.S. Board of Contract Appeals, to hear all bid protests and disputes relating to contract claims.

DoD COMMENTS: Strongly oppose. DoD opposes the creation of a unified body to review both protest and claims. The Armed Services Board of Contract Appeals (ASBCA), as with similar entities at other agencies, was created to provide an effective, efficient dispute resolution mechanism for handling contract disputes. Alternative dispute mechanisms work best at the lowest possible level of bureaucracy. If the ASBCA was consolidated with other boards to create a "super-board," such an entity would only serve as a new layer that adds more time to the process of resolving disputes. The proposed consolidated merely moves the dispute further away from the central figure—the contracting officer.

Individual agency head authority and responsibility to resolve disputes should be preserved. The missions of the various federal agencies are sufficiently different that both the agencies and their contractors are better served by agency boards with expertise in particular areas. There are significant differences between contracts for aircraft carriers and contracts for environmental restoration, and these differences are highly relevant to the contract interpretation that the BCA's engage in when they review claims.

Moreover, the resolution of claims and protests are themselves substantially different and should not be combined into a single forum. They each use significantly different bodies of law that remain distinct from each other. As a result, the BCA's are no more expert in protest resolution than GAO is in contract administration. The methods for deciding each of these different issues are also distinct: claims involve a great many facts but only two parties. Protests center on questions of law, involve many parties and require quick and inexpensive resolution, so that all parties may get on with their business.

Merging these functions will result in the loss of an existing forum—the GAO—that provides a quick, inexpensive and fair resolution of protest issues. Instead, as proposed in the provisions of this bill, a more "court-like" forum would be established, prejudicing the interests of the government and contractor alike.

ALTERNATIVE SOLUTION: None. Retain existing BCA structure and administrative protest fora.

Would authorize Board to review the request of an interested party to any executive agency procurement any decision of a contracting officer alleged to violate a statute or regulation, to consider all relevant evidence, and to presume that the contracting officer decision is correct unless the contractor has shown, through a preponderance of the evidence, that the decision was incorrect. The Board may find a decision violates a statute or regulation for any reason stated in 5 U.S.C. 706(2).[1] (Section 424)

This section would also direct the Board to suspend the agency procurement pending a protest unless an agency head shows that contract award is likely to occur within 30 days and that urgent and compelling circumstances will not permit waiting for the Board decision.

The section also authorizes the Board to allow any discovery necessary for the fair, expeditious and reasonable resolution of the protest. Any information relevant to the protest may be discovered. Protests involving contracts over $1,000,000 shall be reviewed using simplified procedures and permitting only written discovery.

Under this section, frivolous protests may be dismissed, and the Board may recommend that the protester pay costs to the government. The Board is otherwise authorized to direct an agency to take any of a number of corrective actions, including reprocurement and award of costs.

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[1] That citation is to the standard of review used by the courts under the Administrative Procedures Act. It directs set aside of an agency action if 1) arbitrary or capricious, or an abuse of discretion, 2) unconstitutional, 3) outside statutory authority, 4) violative of procedures required by law, 5) unsupported by substantial evidence, or 6) not warranted by the facts if those facts are subject to review by the courts.

INTENDED RESULT: To provide uniform standard and scope of review for all protest review that will ensure fair consideration of issues raised concerning an agency's contract award.

DoD COMMENTS: Strongly oppose. The standard of review that is proposed will not ensure adequate deference to the executive agency's determinations in the contract award process. Under typical, APA-like review of executive agency actions, considerable weight is given to the agency's factual determinations and initial decision because the agency is the expert in its field. Review is very limited, and the entity that reviews the agency decision should not be "second-guessing" the agency's determinations, particularly its factual determinations. Yet, that is precisely what this language would permit. Protest review should be no different than the review of other agency actions under the Administrative Procedure Act. In this proposal, even though the proposed language cites to the Administrative Procedure Act standard of review, the language only provides a "presumption of correctness" to the contracting officer's decision which any protester can rebut by some minimal showing. This review is not the same deference that is shown to executive agency actions under the Administrative Procedure Act.

This issue is particularly important because a significant problem currently exists at the General Services Board of Contract Appeals (GSBCA) on the issue of review. Currently, the GSBCA has jurisdiction to review the preponderance of information technology (IT) protests. Too often, however, the GSBCA substitutes its judgment for that of the contracting officer. This "de novo" review occurs even when the GSBCA asserts, in its decisions, that it is applying only a "rational basis" test to the agency action. Thus, many protests are sustained because insufficient deference was given to the agency determination. This problem is especially evident in so-called "best value" procurements where a contracting officer is weighing intangible factors such as contractor past performance, in addition to cost-technical trade-offs. In such cases, it may be difficult to explain, with mathematical precision, why a particular award was made and why a lower price was not accepted. No decision like this can withstand scrutiny when the reviewer decides to "step into the shoes" of the decisionmaker. Yet this is precisely what occurs with GSBCA review, and predictably, the government decision is often overturned. Because of the higher success rate, in the area of IT procurement, GSBCA protests have become routine—the norm rather than the exception, forcing contracting officers and program managers to spend a great deal of time preparing their procurement for the inevitable GSBCA protest. Examples of recent GSBCA protests include:

- In a recent Air Force IT procurement, the GSBCA upheld a protest where the Source Selection Authority chose to rely on the protester's disastrous past performance on prior government contracts to decide to award to a higher priced and technically superior offeror. The government's estimated costs of defending that protest included over $100,000 in direct costs, with another $50,000 in government labor costs (legal and other). These amounts do not include the award of costs to the protester (estimated at $500,000) nor the costs that will be incurred by the government in conducting a reprocurement.
- In *B3H Corp.* v. *Department of the Air Force,* (July 8, 1994), a 15% price differential was weighed against technical superiority and the decision was made to award to the technical superior offeror. All five technical factors weighed in favor of the awardee. The Board found that the evaluation of one technical factor lacked a rational basis and, on that ground alone invalidated the award, notwithstanding the fact that the solicitation had listed technical as the most important factor. The result of this decision is that agencies are forced to quantify the technical superiority of the higher rated offeror, where it is higher in price, which is difficult, if not impossible, to accomplish. This decision is on appeal and the final costs are therefore not ascertainable.

Further, the proposed language does not adequately limit discovery. Unlike the GAO, which reasonably limits document production to only that pertinent to the grounds of the protest, excessive discovery and other litigation burden has been an extremely substantial problem at the GSBCA. Protesters are allowed to introduce, and agencies are required to defend their decisions, in light of evidence beyond that contained in the agency's file, even if such evidence was never brought to the attention of the agency nor available to the contracting officer at the time the decision was made. The GSBCA permits the parties to obtain from the opposing party any material that might conceivably be relevant to the protest. It permits the introduction of contrary, "expert" witness testimony as to whether the contracting officer made the best judgment or not, leading to ludicrous, and expensive, battles of the experts. This review is both costly and labor intensive. Suggestions to reform the IT protest process made in a recent Senate report (see Computer Chaos: Billions Wasted Buying Federal Computer Systems, Investigative Report of Senator William

S. Cohen, October 12, 1994) called into question the benefits of subjecting a deliberative decision by the agency to review based on a new record hastily created in an adversarial proceeding.

ALTERNATIVE SOLUTION: Adopt alternative protest standard of review language that (1) clearly affords reasonable deference to the executive agency decision (similar to the Administrative Procedure Act standard of review), (2) requires a showing of actual prejudice before a protest may be upheld, and (3) limits discovery to prevent abuse of the discovery process by expansive internal procedures within the protest forum. The National Performance Review has endorsed this type of review because it holds decision makers accountable for their actions, without curtailing innovation and creativity through a fear of being second-guessed. It would also help to avoid the type of wasteful effort on protest avoidance (extensive agency documentation and quantification of decision-making process) that the Senate report found was occurring in IT acquisitions.

Would provide that Chairman of new Board shall be appointed by the President. (Section 413)

INTENDED RESULT: To provide presidentially-appointed leadership to new unified Board.

DoD COMMENTS: Strongly oppose. Bid protest review should be analogous to administrative and judicial review of other executive agency actions. In no other area would an executive agency functions—the award of government contracts—be subject to initial review by another, independent executive branch entity, led by a presidential appointee and created exclusively for that purpose. In other words, the political level of leadership of this new, unified forum, and the structure of the forum itself as, in essence, an independent agency, is totally out of proportion to the level of review that would normally be accorded executive agency functions. In this era of downsizing the federal government, it is completely inappropriate to create a new agency solely for the purpose of reviewing the contract award functions of other agencies.

ALTERNATIVE SOLUTION: None. Retain existing BCA structure and administrative protest fora.

Would authorize the Board to establish rules and regulations that would be unreviewable by any other agency or person. (Section 414)

INTENDED RESULT: To provide the new, unified Board with powers to enact, without review, any desired rules regarding its procedures and policies.

DoD COMMENTS: Strongly oppose. In addition to the fact that the unified Board should not be created, no executive branch agency, even independent ones, should have such sweeping powers to enact any regulation without review. There is no executive branch agency currently in existence, including independent ones, that currently has comparable authority. Unreviewable regulatory power could be readily abused to create internal processes that would turn protest and claim review into an administrative nightmare for procuring agencies and drastically impact the ability of all executive agencies to successfully execute their respective missions.

ALTERNATIVE SOLUTION: None. Retain existing BCA structure and administrative protest fora.

Would authorize attorneys of the Board, designated by the Chairman, to represent the Board in any civil action related to any Board function. (Section 415)

INTENDED RESULT: To provide singular litigation authority for the Board, separate and distinct from the authority of the Department of Justice to litigate on behalf of the executive branch.

DoD COMMENTS: Strongly oppose. There is no rationale for separate litigation authority for the Board. There is no body of expertise that is available only to the Board (as is the case with other executive agencies that retain litigation authority separate from that of the Justice Department).

ALTERNATIVE SOLUTION: None. Retain existing BCA structure and administrative protest fora.

Would require the Board to provide, free of charge, alternative dispute resolution procedures for contract award and interpretation disagreements, provided that any Board judge or employee involved is such alternative dispute resolution procedures may not later be involved in a formal proceeding on the same matter; would require a Board judge who is assigned protest or claims case to attempt initially to resolve the dispute through alternative dispute resolution procedures. (Section 421 and 422)

INTENDED RESULT: To encourage the use of alternative dispute resolution procedures by contracting agencies and government contractors.

DoD COMMENTS: Oppose. Alternative dispute resolution procedures are best implemented directly by the contracting agency. It is the contracting agency that has

the closest, most direct relationship with the contractor and the greatest interest in ensuring amicable settlement of disputes.

ALTERNATIVE SOLUTION: Require agencies to develop internal, ADR-type procedures for the resolution of bid protests; require contractors to utilize such procedures before they may be awarded costs by any protest forum.

Would clarify that the Board may review contracts for the procurement of commercial items. (Section 425)

INTENDED RESULT: To ensure that newly-enacted authority for the FAR to waive the application of procurement-related laws enacted after the passage of the Federal Acquisition Streamlining Act of 1994 (P.L. 103–355) does not apply to this proposed law.

DoD COMMENTS: Do not oppose in principal to the concept that changes in the protest rules should apply to commercial item contracts, but do not support application of proposed protest and claims provisions in this title to any contracts, including commercial ones.

ALTERNATIVE SOLUTION: None.

II. REVIEW OF ADDITIONAL PROVISIONS DOD SUPPORTS

On March 2, 1995, the Administration provided to the Congress draft legislation that it supports as a follow-on to the legislative acquisition reform efforts of 1994. That legislation was later introduced as H.R. 1388. Subsequently, DoD also provided defense-unique legislative proposals to the Congress for consideration in the National Defense Authorization Act for Fiscal Year 1996, which was also introduced as part of S.727, the National Defense Authorization Act for Fiscal Year 1996 (introduced in the Senate on April 27, 1995).

I would like to review certain of those proposals that are not addressed, either directly or indirectly, by H.R. 1670:

GOVERNMENT-WIDE PROVISIONS

Protest Reform

Provide a means for expeditious and fair resolution of contract protests (and claims) through uniform interpretation (by a single court, rather than any district court) of laws and implementing regulations to preclude forum shopping, by consolidating court jurisdiction in the Court of Federal Claims and divesting the district courts of bid protest jurisdiction.

Give agencies the same authority to proceed with a procurement even if award of the contract has been protested at the GSBCA just as they have at the GAO) to preserve the agencies' (who are in a better position to know the urgency of their requirements) authority to proceed with the acquisition while a protest is pending when the agency determines that it is in the government's best interests.

To minimize delays in the delivery of program benefits, require both the GAO and GSBCA to decide dispositive motions before proceeding with a full hearing of the protest on its merits.

Give agencies authority to bring interlocutory appeals to correct erroneous GSBCA rulings on three types of dispositive motions (that the procurement is not subject to the Brooks Act, the protest is not timely filed, or the party filing the protest is not an "interested party") instead of waiting for a determination of the protest on its merits.

Currently, agencies must wait until the protest is decided on the merits before obtaining a ruling on agency motions that would otherwise dispose of the protest. As a result, protests are often unnecessarily prolonged as discovery continues and the merits are heard, briefed and decided. In addition, even where a dispositive motion has been decided by the GSBCA, an agency is unable to seek judicial review of that decision until a final decision is made on the merits of the protests. The effort needed to obtain a ruling on a dispositive motion or seek judicial intervention on any of these three issues is very small when compared to the resources the parties must expend to conduct full discovery and proceed on the merits, particularly before the GSBCA. By requiring early decision on and allowing early judicial resolution of dispositive issues, these provisions will save all parties concerned considerable time and money in addition to minimizing unnecessary delays in the achievement of agency program goals.

Declare a Sense of Congress that agencies should develop procedures for senior level protest resolution and direct that protesters use the agency protest procedure, if available, before costs could be awarded by another forum would guarantee fast, cost and effective resolution of protests.

The Army Material Command has currently in place a voluntary senior level agency review program for disappointed bidders or offerors. Within 20 days after a protest has been filed with the agency, the agency headquarters must make a final decision on the legitimacy of a contract award. That final decision is binding on the agency and its procuring activities. During this process, award is withheld and work stopped unless there is an agency override. Since this program's inception, 290 protests have been reviewed in this venue, each in an average of 15 working days at an average government cost of $13,686. Only 32 of these AMC decisions have been appealed to the GAO or GSBCA. Of those, 30 were decided in favor of AMC.

Reduce frivolous protests by contractors by authorizing GAO to recommend, and GSBCA to direct, an award of costs to the government when a contractor files a frivolous protest.

Since GAO may not direct an executive agency, guidance should be added to the FAR to permit an agency head to initiate action to collect payment from a contractor based upon a GAO recommendation.

Require that the Federal Acquisition Regulation be amended to disallow those costs incurred in preparation, filing, or pursuit of a protest, including attorneys' fees and consultant and expert witness will prevent unsuccessful protesters from being able to recoup their protests costs by including such costs in their indirect overhead accounts on other government contracts.

Permit offerors to agree not to protest a procurement to diminish the disadvantage incurred by companies that, as a policy matter, refrain from protesting agency errors that do not invalidate the basic rationale for the agency's contract award decision even though other companies adopt the strategy of protesting every government error no matter how insignificant.

The refraining companies have adopted a broader perspective that considers the costs of such a strategy—in terms of legal fees, longer acquisition lead-times, and reduced government buying power, and determined that they far outweigh the benefits of harassing their competitors or reversing a few awards they might otherwise have lost. The refraining companies want to focus their efforts on achieving competitive advantage through improved product design, innovation and value rather than through legal argument. This proposal allows offerors to agree to refrain from protesting decisions favoring other offerors as long as those other offerors have also agreed to refrain from protesting. An offeror's decision to sign-up or not to sign-up to the agreement to refrain from protesting will not be taken into consideration in evaluating its proposal.

Exempt procurements under the Simplified Acquisition Threshold and made on FACNET from all protest procedures to reduce acquisition costs by reducing lead time and government personnel necessary to respond to protests.

Procurements using Simplified Acquisition Procedures and the FACNET include inherent safeguards that make abuse of the process almost impossible. Given the limited ability to skew such procurements, the cost of the bid protest process (including the behavior it causes in contracting offices) is not justified.

Empowering Line Managers (Contract Award Items)

Increase the dollar thresholds for approvals at higher levels of individual Justifications for Other than Full and Open Competition, and exempt agencies that conduct a high percentage of competitive acquisitions from having to get sole source justifications approved at higher organizational levels as long as they maintain these high standards, to provide an incentive for agencies to maintain high levels of competition, and to allow front-line procurement professionals to exercise their judgment without the fear of constant second-guessing by higher level officials.

Vest the authority for making certain contracting decisions (e.g., using qualification requirements, and waiving cost or pricing data requirements in certain circumstances, etc.) in the contracting officer to empower front-line personnel, and to eliminate paperwork and other substantial administrative burdens associated with higher-level approvals.

Allow an agency to begin a procurement by soliciting product information based on a statement of what the agency believes are its needs and then to tailor that solicitation based on information provided by offerors concerning the capabilities of their products and their suggestions on how the agencies' needs can best be met to increase greatly agencies' ability to gain ready access to products and technologies in the commercial market; to give contracting officials a very effective means for obtaining the information required to identify suitable commercial products available; and to acquire the best value product or service within reasonable time frames.

This proposal would allow agencies to obtain products suitable for their needs without over-specifying. Developing specifications that address every product characteristic necessary to ensure suitability is difficult, time consuming and futile given the fast pace of product evolution that occurs in today's commercial market. Inevitably, the resulting specifications unnecessarily limit competition by barring suitable alternative and innovative designs.

Allow agencies to limit the number of offerors in the competitive range to three when the contracting officer determines such action is warranted by considerations of efficiency, to enable agencies to expedite the procurement process, and to allow offerors that do not have a real chance of receiving award to save time and money by being removed sooner rather than later in the process.

After initially evaluating each offerors proposal, agencies now, according to General Accounting Office (GAO) and General Services Administration Board of Contract Appeals (GSBCA) decisions, must look for the "natural break" in making a competitive range determination. If there is any question as to whether an offeror should be included in the competitive range, the offeror is kept in the competitive range. The result is that, in order to avoid a protest, agencies generally will not leave any offeror out of the competitive range unless that offeror clearly has no chance whatsoever of being awarded the contract. Thus, many contractors who have no real chance of winning the award continue to incur bid and proposal costs, and the government if forced to expend precious resources evaluating bids that have no chance of winning.

Authorize the establishment of two-phase selection procedures, and award of a single contract for design and construction, lease-construction, or information technology procurements, etc., that require substantial system design or integration work, to increase efficiency in certain instances.

This proposal would add a new section to Title 10 authorizing two-phase selection procedures, and the award of a single contract, as an alternative to the traditional approach of a contract for design services followed by a separate contract for construction or other services. Agencies would be authorized to use two-phase selection procedures for acquiring the design and construction ("design-build") of a public building, or other work of a similar nature, when certain criteria are met. The "two-phase" approach to project delivery involves awarding a single contract for design and construction.

Streamlining Small Business/Socioeconomic Laws

Amend the Small Business Act to authorize SBA to permit contracting activities to award 8(a) contracts directly to small and disadvantaged business firms (eligible program participants,) unless the contracting officer or the small and disadvantaged business firm specifically requests the SBA to be a signatory to the contract, in order to significantly streamline and simplify the 8(a) program.

This delegation need not affect any other assistance that SBA offers to small and disadvantaged businesses. In addition, SBA would be able to revoke the delegation, at any time prior to the issuance of the solicitation, if such an action is determined to be in the best interest of the program or the small and disadvantaged business firm.

Under current law and regulations, contracts are awarded to small and disadvantaged businesses under the 8(a) program of the Small Business Administration (SBA) by the contracting activity awarding a contract to the SBA and SBA awarding a subcontract to the small and disadvantaged business. Normally, both the contract and the subcontract contain or reference a "tripartite agreement" which, among other things, permits the contracting activity to bypass the SBA for most contract administration matters and gives the small disadvantaged business the benefit of the "changes" and "disputes" clauses.

Delete requirement for alternative payment protections under Miller Act to eliminate a costly requirement for contractors that limits competition. (This amendment repeal the requirement for alternative to payment bonds because such alternatives are of limited usefulness while adding significant burden to construction contracting.)

Repeal Walsh-Healey law because it is completely duplicated by other laws that apply to all employers, whether federal contractors or not.

Repeal Small Business Competitiveness Demonstration Program because its dollar thresholds are no longer consistent with the new, Simplified Acquisition Threshold and because goals are already being met without these set-asides.

SAT/FACNET/Procurement Notice

Exempt a contracting activity from the requirement to delay award until 15 days after publishing a solicitation, if a prior synopsis provides all of the information required to be in a CBD solicitation notice, in order to streamline the procurement process by eliminating unnecessary actions, save time, and enhance responsiveness to their customers.

This proposal gives contracting officers flexibility to compress solicitation timeframes when business needs and marketplace support doing so.

Exempt procurements above the SAT, if accomplished on FACNET, from the procurement notice synopsizing requirements, and permitting the establishment of flexible wait periods before contract award, to greatly streamline the procurement process in terms of time and resources required.

Establish $1 million SAT when acquiring services as a small business set aside to provide more efficient method for procuring moderate level of services and to provide greater opportunities for small businesses.

Delete duplicative authority for simplified acquisition purchases to avoid risk of inconsistent future amendments.

Make it easier for front line managers to use micropurchase to empower the workforce, streamline the procurement process and make the system more responsive. (Frontline managers would be able to make the required "noncompetitive determination" without having to involve a contracting officer.)

Technology Innovation

Incentive must be provided for businesses to use and advance commercially technology that was developed publicly, to facilitate technology transfer and strengthen the nation's economy (companies cannot use public domain technology to make profits).

This section allows Federal agency employees to copyright computer software they develop as part of their official duties under, or related to, a cooperative research and development agreement (CRADA) because many private sector organizations will not enter into CRADAs and attempt technology transfer without protection of the intellectual property underlying the technology.

Amend patent law to encourage contractors to file for patent protection in a timely manner if they elect to retain title to an invention, thus speeding the entry of technology into the commercial market

Miscellaneous

Repeal Advisory and Assistance Services reporting document requirement to reduce reporting burden by eliminating the requirement for agencies to identify in their budget submissions a separate object class for advisory and assistance services. (Repeal would also help to streamline the object classification structure set forth by the Office of Management and Budget.)

Amend budget law to keep funds available during administrative procedure to ensure that contracting officers are not "forced" into a decision to award to a particular contractor simply out of fear that if they get a protest, they will loose the money before a decision is rendered (amend 31 U.S.C. 1558 to ensure funds remain available for obligation while an administrative proceeding, such as a small business size challenge, is ongoing; this parallels language protecting funds from expiration when a GAO or GSBCA protest has been lodged (section 813 of Public Law 101–189))

Enact limited waivers from cancellation of funds ("M Accounts") to authorize two categories for which funds will remain available for obligation (without time limit) until the contract purpose is achieved.

- Satellite incentive fees (funds available until fee is earned).
- Shipbuilding (funds available for contract price adjustments, close-out costs, settlement of claims, etc.).

Resolve conflicting precedents on property "ownership rights" set by Federal bankruptcy courts and the U.S. Claims Court by clarifying that, when progress payments made pursuant to 10 U.S.C. 2307 and the comparable civilian statute, title to property acquired or produced passes to the Government ("vests") when the property is allocable or chargeable to the contract.

Amend authority for Extraordinary Contractual Relief to allow the use of this statutory authority to provide indemnification against unusually hazardous risks (without budgeting for the full amount of the liability) in peacetime, as is done now, without the facade of a declaration of a national emergency (which has at present been in effect since the Korean War). (This proposal would repeal limitation that authority for extraordinary con-

tractual relief may be used only when national emergency has been declared.)

Defense Unique Proposals

Broaden statutory waivers for Defense Acquisition Pilot Programs to enable pilots to fully test relief from myriad of laws and regulations which are not applicable to the commercial sector. Relief from these requirements is essential to shift to commercial item acquisition and practices by DoD.

This proposal expands the range of statutory waivers available to FASTA-authorized pilot programs to:

Permit decisions concerning developmental and operational testing to be made by the milestone decision authority (MDA) not by the OSD OT&E Director;

Allow use of standard commercial warranties against manufacturer's defects;

Allow program status reports in a format set by DoD regulation; (vice unique Selected Acquisition Report/Unit Cost Report formats);

Eliminate the separate manpower analysis; and,

Allow the independent cost estimate to be done at MDA level (vs. OSD CAIG).

It also authorizes one new system, and one facility, pilot program.

Streamline testing to produce greater testing efficiency and affordability when procurement accounts are being drastically reduced, and permit the SecDef to expand the use of contractors if impartiality is assured.

This proposal would make minor clarifications, authorizes testing methods that would make more efficient use of diminishing RDT&E and Production funds, and better utilizes the expertise of contractor personnel (i.e., the system contractor would be allowed to provide analytic and logistics support; a contractor could support both developmental and operational test analysis; but could not establish criteria for data collection, performance assessment or evaluation activities).

Amend the defense test program for negotiation of comprehensive subcontracting plans to eliminate an administrative burden on the contractor that ultimately costs the taxpayer money. This proposal seeks alternative methods to adequately plan for small/small-disadvantaged subcontracting while decreasing the administrative burden.

This proposal would allow firms covering a wider range of supplies and services (thus enhancing business opportunities for small/small and disadvantaged businesses to participate in the comprehensive subcontracting plan test by:

Allowing multiple purchasing activities in each service to take part.

Reducing the number and total value of contracts required for a contractor to participate (3/$5M vs. 5/$25M).

Changing the base period from FY89 to the fiscal year preceding the current fiscal year.

Allowing new contractors to enter the program after FY94.

Prevent an inundation of shipbuilding contract claims by clarifying that the 18 month limit on shipbuilding claims for contracts entered into before enactment of FASTA applies to both the Board of Contract Appeals, courts, and Service Secretaries (counters a recent Federal Circuit Court of Appeals decision that the 18 month limitation period applies only to Service Secretaries clarify conflicting precedents on property "ownership rights" set by Federal bankruptcy courts and U.S. Claims Court)

Amend Unit Cost Reports to eliminate duplicate reporting that wastes time and personnel resources; such duplication must be eliminated in this era of downsizing. (Would make technical corrections to the 10 U.S.C. 2433 to eliminate duplicate reporting of the same unit cost breach when a new acquisition program baseline is not approved prior to the end of the fiscal year in which the unit cost breach occurred and to provide for reporting of subsequent breaches after a unit cost breach occurs but before a new acquisition baseline is approved. Also, the proposal restores the requirement to report increases after the initial report of unit cost breach which was deleted in the FASTA amendment.)

Repeal Bar on Documenting Economic Impact to streamline acquisition process by eliminating excessively detailed statutory oversight. (This section would repeal an unnecessary statutory provision that duplicates a regulation banning the use of government contract funds to show the economic impact of a government contract.)

Amend Undefinitized Contract Actions authority to make more responsive in times of crisis; it should allow contracting personnel flexibility to use undefinitized contracts to support special operations such as peacekeeping, humanitarian assistance, and disaster relief missions. (This section would

amend undefinitized contract action authority to exempt from its limits undefinitized contract actions to support peacekeeping, humanitarian assistance, and disaster relief missions.)

Repeal Delegations authority; statutes related to acquisition should be streamlined to eliminate duplicative and unnecessary laws. (This section would clean up the statutes by repealing an unnecessary law authorizing Service secretaries to delegate specified research contracting authorities (unnecessary because the secretaries have inherent authority to delegate)).

Amend law on coordination and communication of defense research activities; there are sectors of the industrial base that are characterized by rapid change in technology, but the rigidity of the current acquisition does not allow an adequate means to address this and the potential use of commercial and NDI. (This section would provide flexibility needed to reflect changing acquisition processes by authorizing technological issues to be addressed at "all decision reviews" and eliminating the requirement that they be considered and documented specifically at Milestones 0, I and II).

Make technical correction in Authority to Procure for Experimental Purposes. (Would amend newly codified authority, at 10 U.S.C. 2373, to procure noncompetitively limited quantities for test or experimental purposes, to conform codified section to full scope of prior existing service specific statutes.)

Repeal Spare Parts Quality Control to permit DoD to move away from the use of government unique specs and standards that are outdated and do not recognize modern industrial manufacturing methods. Failure to do this may result in the procurement of higher-priced, inferior quality goods. Specifically, qualification and quality standards should be a matter for engineering and technical judgment based on current needs, technology and experience with the use of the particular item. (This proposal would repeal 10 U.S.C. 2383, requiring contractors providing critical aircraft or ship spare parts to provide parts that meet specified quality requirements (using quality requirements for original parts unless written determination to the contrary).)

Amend requirement for Independent Cost Estimates; by empowering the workforce, to include decisionmakers at lower levels, we shorten administrative cycle times, strengthen the competence of middle management and allow our senior executives more time to deal with strategic issues. (This section would align level of organizational responsibility for independent cost estimating with the level of the program decision, to allow independent cost estimates for acquisition category IC programs to be done by:

- Army Directorate of Cost Analysis
- Naval Center for Cost Analysis
- Air Force Office of Cost and Economics).

Make Technical Amendment in Authority to Sell. (This section would resolve inconsistency in two statutes dealing with fees charged to users of DoD Test Facilities) to require them to charge direct costs and allow them to charge indirect costs when appropriate.)

Amend Authority to Manufacture at Factories and Arsenals; The Secretary of Defense and secretaries of the military departments should have complete discretion to determine which manufacturing functions should remain in-house and which should be outsourced. (This section would consolidate and make consistent two statutes dealing with manufacture of supplies at service-owned factories/arsenals by giving all services discretionary authority to manufacture in-house (Army previously had to seek a waiver not to produce in-house).

Streamline Naval Salvage Facilities by consolidating all statutes pertaining to contracting for naval salvage facilities, and eliminating outdated appropriations ceiling.

Remove limitation in Civil Reserve Air Fleet to permit CRAF contractors to use commercial fields even in absence of full CRAF activation. The challenge of combining downsizing with expansion and diversity in military mission requires creative solutions. The post Cold-War period finds the U.S. military deployed to more areas around the globe than ever before. However, we are still downsizing our active force, to include our Air Force. The capability provided by CRAF is critical to our ability to react in times of crisis. (This section would increase flexibility of CRAF operations by permitting DoD to grant CRAF contractors limited commercial use of CONUS airfields during operations requiring less than "full" CRAF activation.)

Amend Defense Acquisition Workforce Act Improvements to promote flexibility in workforce. Laws such as Goldwater-Nichols and DAWIA have put requirements in place that, by themselves, would enhance the professionalism of the military. However, when taken in total, the impact on these requirements makes effective career management of certain groups such as the military members of the Acquisition Corps, almost impossible. Additionally, it creates a lack of flexibility in the workforce that keeps DoD from being able to effectively utilize a group of highly trained and highly motivated officers. (This section amends 10 U.S.C. 663 to authorize the Secretary of Defense to exclude military members of the Acquisition Corps (defined in 10 U.S.C. 1731) who have graduated from the Senior Acquisition Course at the Industrial College of the Armed Forces, from the mandatory joint duty requirement if the individual is to be assigned to a Critical Acquisition Position (defined in 10 U.S.C. 1733) so that they will not be assigned to acquisition career fields in which they are not certified; to joint billets that don't require acquisition expertise; or have their promotion competitiveness penalized simply because there are generally more acquisition graduates than expected joint billets. It also corrects adverse effects on the acquisition workforce, increases management flexibility in employing innovative practices, and recognizes the realities of downsizing and related personnel turbulence, by eliminating the three year mandatory assignment for persons assigned to critical acquisition positions (10 U.S.C. 1734(a).)

Exempt Simplified and Commercial Item Purchases from Prohibition on Gratuities to take a more business-like approach to our contractors by treating them as honest businessmen and not assuming that the majority normally act in a corrupt manner. It allows DoD to conduct business in a manner more acceptable to the private sector. (This section would exempt contracts under the simplified acquisition threshold and contracts for commercial items from a mandatory contract clause prohibiting the use of gratuities in obtaining government contracts.)

This concludes my prepared remarks.

Mr. CLINGER. Panel four, if they would come forward, please. First we have Mr. John Miller, who is with the law firm of Gadsby and Hannah, and serves as the chairman of the section of public contract law of the American Bar Association.

Mr. Miller, thank you for being with us.

And second we have an old friend who is not unfamiliar with this room and with this panel, Mr. Stephen Daniels, who is Chairman of the General Services Administration Board of Contract Appeals in the General Services Administration, which has been alluded to once or twice during this hearing.

[Witnesses sworn.]

Mr. CLINGER. Mr. Miller, please proceed.

STATEMENT OF JOHN MILLER, GADSBY & HANNAH, ON BEHALF OF THE SECTION OF PUBLIC CONTRACT LAW, AMERICAN BAR ASSOCIATION

Mr. MILLER. Thank you, Chairman Clinger. It is great to be down here from Boston where it is a very dismal and rainy day. It is nice to be in Washington. Thank you for inviting us. We are very pleased to be here.

With me is Rand Allen, who is chair of our section's legislative coordinating committee. We very much appreciate the opportunity to appear before the committees to comment on improving the bid protest process, to endorse amendments to procurement integrity, as set forth in the bill, and to endorse the repeal of defense-specific conflict of interest rules, also as set forth in the bill.

I will leave much of what we have to say for the written testimony that we have submitted. But I would like to talk at some length about the package proposal that the section of public con-

tract law submitted in our written testimony to substantially improve and simplify the Federal bid protest process.

I have never been as proud to be a member of the section of public contract law as I was last Saturday when we developed these proposals in response to the bill, in an all-day meeting in Washington, we had 120 votes possible cast and there was 1 abstaining vote and 1 dissenting vote from 6 votes that were conducted by our council in favor of the package this is submitted in the testimony today.

This consensus is the product of long years of work by our section, which has members from Government, senior lawyers working for the Government, senior corporate lawyers working for major corporations, small business corporations, the entire gamut of suppliers to the Government, and private practitioners.

Our proposal was directed solely at improving the procurement system and is truly offered in the broad collective interest of Government, its contractors, the Congress and the public. We recommend the adoption of the entire package as the best response to all of the issues currently raised before Congress about bid protests.

Our guiding principles were to simplify the process, to expedite the resolution of bid protests, to reduce Government and private sector transaction costs, to maintain supplier confidence in the procurement system, and thereby increase competition and to improve the system generally. We know that you share these goals and we are very excited to be here and to try to offer what we think is a very constructive piece of the pie that you are working on.

There are six key elements to our package proposal, the first of which is a single, simple standard of review throughout Government procurement. And we propose the following simple formulation as a governmentwide standard in bid protest matters.

Agency action is entitled to the presumption of correctness, which a protestor may rebut by demonstrating by a preponderance of the evidence that the agency action was arbitrary or capricious or a prejudicial violation of law or regulation.

The second element is a single, simple scope of review aimed at expeditious and cost-effective resolution of bid protests. We believe that in deciding a bid protest, the forum shall consider the agency record as may be supplemented by information which is relevant to establishing whether the agency action was arbitrary or capricious or a prejudicial violation of law or regulation.

The forum may authorize discovery and/or hearings to the minimum extent necessary to resolve the issues raised in an expeditious and cost-effective manner. We believe this proposal would put the brakes on some of the abuses that the Congress and its committees have heard about the bid protest process.

The third element of our proposal is to eliminate the award of protest costs entirely, with the exception of small business. We believe that except in the case of successful protests by small businesses, the award of bid protest costs should be abolished.

The fourth element of our proposal is to provide legislative authority to the bid protest forum to order sanctions for frivolous protests. We support the grant of legislative authority to the forum to

order appropriate sanctions, including assessment of the costs of defending a protest.

The fifth element of our package proposal, Chairman Clinger, is an agency override of suspension of award or performance. We believe it is time to put in the agency's control the decision to suspend performance or award.

We recommend that the agency, not the bid protest forum, make this decision as described in my testimony; and further, that the bid protest process provide agencies with incentives to use this authority wisely and to use it well.

We believe that following the timely filing of a protest, contract awards should not be made and contract performance should be suspended except in those cases where the head of the contracting activity determines that urgent and compelling circumstances require the agency to go forward, or the head of the agency determines that proceeding with the award or with performance is in the best interests of the United States.

These determinations would be justified in writing before the agency proceeds with the procurement, and if the agency proceeds with the procurement despite the filing of a timely protest, then the bid protest forum, in adopting a remedy, should not consider the cost or disruption to the Government from terminating, recompeting, or reawarding the contract. In other words, the agency would be in control of the decision on whether or not to suspend, but if it turns out that the agency is wrong, the bid protest forum should not consider the interruption cost caused by that decision.

The sixth element relates to the number and type of forums and whether they should be administrative, judicial or agency forums. We believe very strongly that there should be at least one administrative bid protest forum which is external to the contracting agency, a judicial forum, and an agency forum to resolve bid protests. Agencies in particular should continue to be authorized and encouraged to adopt meaningful and improved bid protest procedures.

We had a long and productive meeting on Saturday about this very topic and we believe there are a lot of other issues on the procurement plate, but bid protest seems to be the magnet upon which everyone is willing to land. We believe that our proposal, which we think strikes a very fair balance between the Government's need to proceed with procurements and not be interrupted and disrupted by protests, together with the need for a fair and efficient and simple process. Our package solves many of the problems that were discussed in previous panels this morning.

As I mentioned, we strongly endorse the changes suggested in the bill in the area of procurement integrity. We have long been an advocate of that and we applaud the committees for addressing those issues. We have some technical amendments that are described in the testimony.

We also endorse the repeal of defense-specific conflict of interest rules. They are redundant; they don't need to be there. They are the kind of rules that make it difficult for the procurement officials you just heard testify to stay in Government.

In conclusion, we are committed to advancing procurement law through an open process. We appreciate very much your asking us here, and it is an honor and pleasure to give our views to you.

Thank you.

[The prepared statement of Mr. Miller follows:]

PREPARED STATEMENT OF JOHN MILLER, GADSBY & HANNAH, ON BEHALF OF THE SECTION OF PUBLIC CONTRACT LAW, AMERICAN BAR ASSOCIATION

Mr. Chairman, I am John B. Miller, Chair of the Section of Public Contract Law, of the American Bar Association. With me is Rand L. Allen, Chair of the Section's Legislative Coordinating Committee. The Section appreciates this opportunity to appear before the Committee to comment on improving the Bid Protest Process, to endorse amendments to Procurement Integrity as set forth in H.R. 1670, and to endorse the repeal of defense-specific conflict of interest rules as set forth in H.R. 1670.

The work of the Committee is of central importance to the Section of Public Contract Law. Our Mission:

> "is to improve public procurement and grant law at the federal, state and local levels . . . by contributing to developments in procurement legislation and regulations; by objectively and fairly evaluating such developments; by communicating the Section's evaluations, critiques and concerns to policy makers and government officials; and by sharing these communications with Section members and the public."

The Section[1] is the only national organization of lawyers with members from government, corporations, and law firms that is focused on procurement issues. Because of its unique position, the Section has an extraordinary duty to work for improvements in the procurement process. The Section's goal is simple, yet ambitious: to be a reliable, respected, national resource for balanced, unbiased, analysis and ideas for improving procurement laws at all levels of government.

I. INTRODUCTION

This is in response to your letter of March 24, 1995, which requested comments on H.R. 1038 (the "Clinger Bill") and the Administration Bill (now introduced by request as S. 699). The Section appreciates your request for our comments on the substitute bill, H.R. 1670, filed on May 16, 1995, which added substantial additional language covering a number of procurement issues of interest to the Section of Public Contract Law.

Contained herein are:

(1) the Section's Package Proposal to Substantially Improve and Simplify the Bid Protest Process, which relates to Title IV of H.R. 1670 and to Title I, Subtitle C—"Procurement Protests" of the Administration Bill;

(2) the Section's comments on § 305(a) of H.R. 1670, which relate to the Procurement Integrity (formerly contained in H.R. 1038 at Section 2); and

(3) the Section's comments on § 305(b)(1) of H.R. 1670, which provides for the repeal of 10 U.S.C. 2397, 2397a, 2397b, and 2397c and 10 U.S.C. 281.

Not yet included are the following:[2]

(4) the Section's comments on the remaining aspects of H.R. 1670,

(5) the Section's comments on "non-bid protest" aspects of the Administration Bill.

The views expressed herein are those of the Section of Public Contract Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

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[1] The Section of Public Contract Law is not an industry organization—rather, it is a national organization of attorneys from government, corporations, and private law firms who represent public and private sector clients, respectively, on each side of procurement transactions. The Section is governed by a Council with representation from government, corporate counsel, and private law firms. The Section's Officers and Council act, in effect, as a crucible, in which the interests of the government, the public, and the private sector are carefully considered, analyzed, and balanced. All positions taken by the Section of Public Contract Law before Congress and Executive Branch agencies, including this testimony, are first reviewed and approved by the Council, in order to extend the Section's reputation for balanced, reliable, and professional analysis of procurement issues pending in Congress and the Executive Branch.

[2] We are working diligently to complete our comments on each of these items.

II. A PACKAGE PROPOSAL TO SUBSTANTIALLY IMPROVE AND SIMPLIFY THE BID PROTEST PROCESS

Following lengthy analysis,[3] debate, and discussion, the Section of Public Contract Law submits the following package proposal to substantially improve and simplify the federal bid protest process and to resolve substantial current debate about the process. This package represents an overwhelming consensus opinion among the Section's Officers and Council on the fundamental elements of a simple, less expensive, more effective, and fair federal bid protest system. This consensus is the product of extensive discussions among Section members with substantial current experience as attorneys representing the interests of government agencies, private corporations, and private law firms. The Section's proposal is directed solely at improvement of the procurement system, and is truly offered in the broad collective interest of government, its contractors, the Congress, and the public.

The Section decided that it should present this package of reform for the bid protest area because there are a number of bills pending before the Congress, including H.R. 1670, which offer different, specific, changes to the system for resolving bid protests.

The Section recommends the adoption of the entire package of principles set forth below as the best response to all the issues currently raised before Congress.[4] Our guiding principles were to substantially simplify the bid protest process, to expedite both the resolution of bid protests and the implementation of agency programs, to reduce both government and private sector transaction costs associated with bid protests, to maintain supplier confidence in the procurement system (and thereby to increase competition),[5] and to improve the procurement system generally. We know that these are goals shared by Congress in its current effort to reshape the bid protest process.

There are six key elements to the Section's Package Proposal.

A. Element One—A Single, Simple Standard of Review Throughout Government Procurement

We propose the following simple formulation as a government wide standard of review in bid protest matters.

> STANDARD OF REVIEW. Agency action is entitled to the presumption of correctness, which a protester may rebut by demonstrating by a preponderance of the evidence that the agency action was arbitrary or capricious, or a prejudicial violation of law or regulation.

Obvious advantages flow from this single, simple, government-wide formulation for the standard of review,[6] including ease of implementation, predictability and stability of expectations by agency and contractor personnel, and ease of implementation by decision makers. We believe such a single, simple standard of review will reduce confusion in the bid protest process and reduce transaction costs throughout the system.[7]

B. Element Two—A Simple, Single Scope of Review Aimed at Expeditious and Cost Effective Resolution of Bid Protests

We believe that the scope of review in bid protest cases can be revised and improved by the Congress in a way that streamlines the process, reduces transaction costs for the government, protesters, and intervenors, while maintaining the crucial link between nationwide confidence in the procurement process and increased competition that such confidence engenders both in the private and public sectors.

We propose a similarly simple, single statutory formulation to provide Congressional guidance to bid protest decision-makers as to the extent of the record and the extent of hearings in bid protest matters.

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[3] The Section's Bid Protest Committee has been working on recommendations for process improvements for months, and includes wide representation among government attorneys, board members, GAO attorneys, corporate counsel, and private practitioners.

[4] Because this issue is of vital concem to the procurement system, we would be pleased (and are fully prepared) to assist Congress in the development of specific language to implement these concepts.

[5] The Section believes that effective and efficient bid protest remedies are necessary to support the goals of full and fair competition because they preserve confidence in the integrity and fairness of the source selection process.

[6] The Section is confident this simple, yet well-known, standard of review will be successfully applied in all forms of bid protest, including source selection decisions, reverse protests, cancellation of solicitations, and the legality of a solicitation.

[7] To implement this recommendation at the Court of Federal Claims, the language of 28 U.S.C. § 1491(a)(3) would have to be revised.

SCOPE OF REVIEW. In deciding a bid protest, the forum shall consider the Agency record as may be supplemented by information which is relevant to establishing whether the Agency action was arbitrary or capricious, or a prejudicial violation of law or regulation. The forum may authorize discovery and/or hearings to the minimum extent necessary to resolve the issues raised in an expeditious and cost effective manner.

This formulation sends a clear message to the forum, government agencies, and contractors that discovery and/or hearings are available to protect nationwide confidence in the procurement system, but to the minimum extent necessary to resolve the issues raised by the protest in an expeditious and cost effective manner. Under the Section's single, simple formulation, Congress would give the bid protest forum the flexibility needed to match the discovery and/or hearings needed to the issues raised by the protest. The statutory language does not micro-manage the forum's decision making process and permits these matter to be decided by the forum with the express Congressional direction that hearings and/or discovery be authorized, if at all, to the minimum extent necessary to resolve the issues expeditiously and effectively.

C. Element Three—Eliminate the Award of Protest Costs, Except to Small Business

Few aspects of the current bid protest process have generated more public controversy than the award of bid protest costs. To address this issue squarely and simply, rather than through more complex procedures, exhaustion of remedies, or other approaches, the Section makes the following recommendation, as the fourth key element in its package of reforms in the bid protest area.

ELIMINATE AWARDS OF BID PROTEST COSTS. Except in the case of successful protests by small businesses, the award of bid protest costs should be abolished.

The award of bid protest costs is widely viewed with great skepticism throughout the public and private sectors. For intervenors in the bid protest process, who are rarely, if ever, entitled to award of such costs, the practice is arbitrary. For government agencies, payment of bid protest costs represents a direct reduction in otherwise available program funds. To others, including the public, the availability of bid protest costs awards often appears to be the cause of protest filings. As one key element in the Section's package of proposals to reform the bid protest process, we believe Congress should abolish the practice of awarding bid protest costs to successful protesters, except for small business as authorized by FASA.[8]

This recommendation has nothing to do with allowability of bid protest costs. The Section takes no position on proposals regarding allowability, other than the hope that the simplifying package of proposals set forth herein is preferable to the addition of cost accounting and auditing requirements, which increase rather than reduce government wide transaction costs.

D. Element Four—Provide Legislative Authority to the Bid Protest Forum to Order Sanctions for Frivolous Protests

The Section supports the grant of legislative authority to the bid protest forum to order appropriate sanctions, including assessment of the costs of defending a protest.

LEGISLATIVE AUTHORIZATION TO THE BID PROTEST FORUM TO ISSUE SANCTIONS FOR FRIVOLOUS PROTESTS. The bid protest forum should have the legislative authority to exercise its own discretion to grant appropriate sanctions when it determines that a protester has filed a frivolous protest, including assessment of the costs of defending a protest.

Congress need not reinvent the wheel here, and need not create new standards or definitions, since it can be more effective and efficient in adapting this concept to bid protests by simply following standard language on the ability of a forum to sanction frivolous actions. Obviously, the test for whether a protest is frivolous is, and should be, more than whether there was a valid basis for sustaining a protest or whether the protest is ultimately successful. The Bid Protest forum is well equipped to determine whether, in what circumstances, and to what extent sanctions should be ordered in particular cases. For example, the Section 800 panel recommended that sanctions are unwise where a protester discovers information to the effect that a portion of its protest (or all of the protest) is frivolous and promptly withdraws such frivolous portions. The bid protest forum should be authorized by the Congress to make such determinations.

[8] Note that this recommendation has nothing to do with the ability of the forum to award bid preparation costs as an alternate remedy, which is an entirely different, and non-controversial subject.

E. Element Five—Agency Override of Suspension of Award or Performance

The fifth element in the Section's package of proposals to reform the bid protest area relates to suspension of award or performance of a contract, and in particular, to who makes the decision whether to override the suspension by proceeding with award and performance after a protest has been filed. The Section recommends that the agency, not the bid protest forum, make this decision as described below, and further, that the bid protest process provide agencies with incentives to use this authority wisely and well.

> AGENCY OVERRIDE OF SUSPENSION. Following the timely filing of a protest, contract award should not be made and contract performance should be suspended, except in those cases where (a) the head of the contracting activity (HCA) determines that urgent and compelling circumstances require the agency to go forward, or (b) the head of the agency (or, in his/her absence and unavailability, a delegee) determines that proceeding with award or performance is in the best interest of the United States. All such determinations shall be justified in writing before the agency proceeds with the procurement. If the Agency proceeds with the procurement based on a determination that such action was in the best interest of the United States and if the protest is sustained, the bid protest forum, in adopting an appropriate remedy, shall not consider the cost or disruption to the government from terminating, recompeting, or re-awarding the contract.

The Section believes that this element of the package represents a fair compromise between the interests of the entire nation in a fair, competitive procurement system and the needs of agencies, who are most familiar with their own programs, to manage the procurement business of federal agencies. The proposal encourages federal agencies to exercise the authority to override a universal suspension of award and performance wisely and fairly, through written safeguards and through protections to protesters who pursue their protests following an agency override.[9]

F. Element Six—Administrative, Judicial, and Agency Forums: Number and Type

The Section offers the following general recommendations as the final element in its package of reforms in the protest area.

> ADMINISTRATIVE, JUDICIAL, AND AGENCY FORUMS. There should be at least one administrative bid protest forum which is external to the contracting agency, a judicial forum,[10] and agency forums to resolve bid protests. Agencies, in particular, should continue to be authorized and encouraged to adopt meaningful and improved bid protest procedures.

The Section does not take a position on whether it is better to have multiple administrative forums, i.e. the General Accounting Office and one or more administrative bid protest forums within the Executive Branch.[11] If bid protest authority is placed by Congress in an administrative forum which also has contract appeals authority under the Contract Disputes Act (as suggested in H.R. 1670), care must be taken to ensure that bid protests do not unduly delay prompt resolution of Contract Disputes Act ("CDA") matters.

The Section does not take a position on the current bid protest jurisdiction in the Court of Federal Claims under 28 U.S.C. § 1491(a)(3). In order for the Court of Federal Claims to implement the simple, streamlined bid protest system described in these comments, namely, a single standard of review and a single scope of review, the language of 28 U.S.C. § 1491 (a)(3) must be revised.

The Section believes that the package of recommendations made herein will substantially simplify the bid protest process, offering the prospect that protests will increasingly be resolved at the agency level. The Section recommends that Congress encourage agency bid protest procedures to include (a) agency suspension of award or of contract performance, (b) tolling of the time limits for access to the independent administrative bid protest forum, and (c) a decision on the protest at a agency level above the level of the person who made the source selection decision. These enhancements of agency protest procedures would tend to move protests down to the

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[9] This element is not intended to affect the authority of the federal district courts.

[10] The jurisdiction of the federal district courts to review source selection decisions or any other Agency action (so called "Scanwell" jurisdiction) should not be disturbed. Judicial review of administrative action under the Administrative Procedure Act is an important part of the checks and balances in our constitutional system, and offers, in the very small number of Scanwell suits filed each year (estimates are in the range of thirty (30) cases per year) ready access, in familiar surroundings, for citizens to protest agency procurement actions locally.

[11] For example, at the respective Boards of Contract Appeals, at a combined civilian board and a combined military board, or at a single combined board.

lowest independent level above the source selection decision maker, conserving resources and reducing transaction costs.

III. THE SECTION ENDORSES H.R. 1670'S CHANGES IN THE AREA OF PROCUREMENT INTEGRITY

The Section strongly endorses the changes suggested by § 305(a) of H.R. 1670 in the area of Procurement Integrity. This language is substantially similar to text proposed jointly in 1991 by the Office of Federal Procurement Policy and the Office of Government Ethics, and which was endorsed and recommended in 1993 by the Section 800 Panel.[12] The Section supports the changes proposed in the Bill, just as we supported these concepts in 1992 and in 1993,[13] as a significant step in the right direction of rationalizing and streamlining an extremely complex and burdensome area of the law. The Section endorses the proposal as even more appropriate in 1995, given the need to facilitate commercial sector participation in the government marketplace, as well as government contractor competitiveness in the commercial marketplace.

A. Technical Corrections

1. To § 305(a) of H.R. 1670, to be Codified at 41 U.S.C. § 423(a)(2)

That portion of section 305(a) of H.R. 1670 which would be codified at 41 U.S.C. § 423(a)(2) could be improved by amending the language to require that the government designate, in connection with each specific procurement, those individuals who are to be covered under the prohibition, particularly those individuals who are not government employees but who may have acted on behalf of or advised the agency regarding a procurement. Such a change would complement the other improvements made in this area by the Bill.

2. To § 305(a) of H.R. 1670, to be Codified at 41 U.S.C. § 423(d)(1)(B)(i)

That portion of section 305(a) of H.R. 1670 which would be codified at 41 U.S.C. § 423(d)(1)(B)(i) should be deleted as redundant, since 18 U.S.C. § 201 already provides substantial criminal penalties for providing anything of value to an official by reason of his or her position as an officer of the United States or to influence an official act.

3. To § 305(a) of H.R. 1670, to be Codified at 41 U.S.C. § 423(f)

That portion of section 305(a) of H.R. 1670 which would be codified at 41 U.S.C. § 423(f) prohibits bid protests based on alleged violations of the Procurement Integrity Act unless the "person" filing the protest reported "information" to the responsible agency no later than 14 days after that "person" first discovered the possible offense. Since virtually all protests are filed by corporations, this provision needs to be clarified to avoid the illogical result that undisclosed knowledge by low level employees of procurement integrity violations might preclude corporations from bringing protests.

IV. THE SECTION ENDORSES H.R. 1670'S REPEAL OF 10 U.S.C. 2397 TO 2397C AND 18 U.S.C. § 281

The Section also strongly endorses repeal of the Defense-specific conflict of interest provisions in 10 U.S.C. 2397, 2397a, 2397b, and 2397c and 18 U.S.C. § 281, as set forth in §§ 305(b)(1) and (b)(3) of H.R. 1670. Conflict of interest provisions have always represented a balancing act between protecting the Government from unethical conduct and encouraging individuals to seek positions within the Government. As the Bar of the City of New York noted in its seminal report, Conflict of Interest and Federal Service, Harvard University Press (1960), a patchwork of confusing and complex conflict of interest provisions is a hindrance to these goals. Congress and the OGE have expanded and clarified Government-wide revolving-door rules and standards of conduct in recent years. The Defense-specific provisions do not add to the rational enforcement of federal ethics and their repeal need not be linked to

[12] A version of this proposal was initially included in the Federal Acquisition Streamlining Act ("FASA") but was deleted before final passage, with minor exceptions.

[13] A copy of the Section's August 25, 1992 letter to the Section 800 Panel is attached.

modifications of the Procurement Integrity Act. They should be repealed to help establish a simplified, consistent body of conflict of interest provisions.[14]

V. CONCLUSION

The Section is committed to advancing the procurement law through an open process in which the interests of the government, the public, and the private sector are understood and aligned. We support the effort in H.R. 1670 to improve the Procurement Integrity provisions and to repeal defense specific conflict of interest provisions. We hope the Congress agrees with the Section that the balanced simplicity of the Section's approach to bid protest reform is one worthy of adoption, as a package, in whatever legislation Congress adopts in the field of procurement reform during this Session.

Thank you for requesting our views. It is an honor and a pleasure to offer them.

AMERICAN BAR ASSOCIATION, SECTION OF PUBLIC CONTRACT LAW,
WASHINGTON, DC,
August 25, 1992.

Col. SUSAN MCNEILL, USAF,
8580 Cinderbed Road,
Suite 800,
Newington, VA.

Re: Request for Comments on Laws Relating to False Claims, Procurement Integrity and Acquisition Rulemaking: 57 Fed. Reg. 13717

DEAR COLONEL MCNEILL: On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry and Government service. The Section's governing Council and substantive committees contain a balance of members representing these three segments to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

DISCUSSION

Pursuant to the request of the Standards of Conduct Working Group of the Department of Defense ("DoD") Advisory Panel, the Section is submitting comments on matters relating to procurement integrity. The Section believes that the current procurement integrity regulatory scheme includes unnecessary burdens and uncertainties which detract from the efficiency of the procurement process.

A. Impact of the Procurement Integrity Act

At the outset, many restrictions of the Procurement Integrity Act ("the Act") reflect the increasingly adversarial relationship (and a general atmosphere of distrust) between contractors and their Federal Government customers. The Act further criminalizes the procurement process and thereby restricts the flow of information between the Government and its contractors. While the Section recognizes that to protect the integrity of the procurement process there must be limits on such communications, the Government's interest in obtaining the products that meet its needs at the lowest cost can only be achieved by maximizing, not minimizing the flow of information.

The potential impact of the current restrictions is particularly great for commercial companies whose sales to the Federal Government are a small element of their overall sales. Although such organizations often offer state-of-the-art goods and services to the Federal Government, many of these companies simply cannot or will not devote the resources and training required to comply with all the complex requirements to the same extent that defense contractors are willing to do so. Fre-

[14] A complete history of these provisions appears in the Section's Monograph, "Personal Conflicts of Interest in Government Contracting", Section of Public Contract Law, American Bar Association, 1988.

quently, these "non-defense" contractors use the same sales force for both commercial and federal sales, but the Act makes the free flow of information normally seen in commercial transactions a crime. For example, a salesman requesting the identities of his potential competitors is permissible behavior in the commercial environment because it permits the company to determine whether and how to compete. But the same request in the federal procurement context could be a *prima facie* violation of the Act, even if the request has no impact on the procurement process. Thus, the Act presents barriers to commercial organizations who might otherwise wish to enter the federal marketplace, because they must consider not only significant changes required in the behavior of their sales force but also the consequences of making such changes in their marketing practices.

B. Comments on the OFPP/OGE Proposed Bill

As discussed above, the Act is too broad because it makes conduct that has no impact on the procurement illegal, e.g., even requesting information that is defined as procurement sensitive is a potential violation, regardless of whether information was in fact provided. In this regard, the Section believes that the Office of Federal Procurement Policy/Office of Government Ethics ("OFPP/OGE") proposal is a significant step in the right direction. First, the proposal eliminates confusion regarding when the restrictions begin and which individuals or entities are covered by the restrictions. It accomplishes this by focusing on the flow of information that could adversely impact a federal procurement.

The Section believes, however, that the proposed bill could be improved as follows:

1. The penalty provisions in Section 27(d)(1)(B)(i) should be deleted. Providing anything of value to an official "by reason of" their position as an officer of the United States or to influence an official act constitutes an illegal gratuity or bribery under 18 U.S.C. § 201. The redundant penalty in the OFPP/OGE bill is therefore unnecessary.[1]

2. Like the existing Procurement Integrity provisions, the proposed bill places limitations on disclosure of procurement sensitive information or obtaining procurement sensitive information. A "knowing and willful" standard applies to this conduct. The first restriction is applicable to all individuals (officers of the United States or individuals acting on behalf of or advising the United States) who have access to procurement-sensitive information by "virtue of . . . [their] relationship" to the United States. The proposed bill should be amended to require formal designation of individuals covered under these restrictions. This is especially true for contractor personnel who may be requested to participate in source selection.[2] All other individuals, including Government personnel without authorization to view procurement sensitive information, would be subject to the second restriction regarding "obtaining" such information.

3. The OFPP/OGE bill provides that protests alleging a procurement integrity violation cannot be brought unless the individual who reported the information "believed it to constitute[] evidence of the offense no later than ten (10) working days after he first discovered the possible offense." This provision is ambiguous as it does not clearly define when a corporate entity would first have knowledge that it discovered a possible offense.[3] Moreover, although hearsay would be legitimate support for bringing a protest to obtain further discovery regarding a possible violation, it would not be sufficient to constitute evidence of a "possible violation." The OFPP/OGE bill should be clarified to ensure that legitimate protests are not cut off by a corporation's failure to report unsubstantiated hearsay.

C. Additional Recommendations

As discussed above, the OFPP/OGE bill would remove many of the uncertainties and burdens of the current procurement integrity regulatory scheme. Additionally, it recommends repeal of various conflict of interest provisions in Titles 10, 18 and 42 of the United States Code. These statutory provisions have been in a state of flux for the last 4 years as part of continuing efforts to modify the scope of the Act.

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[1] Additionally, the Section notes that the definition of a "thing of value" in the Federal Acquisition Regulation ("FAR") under the current Procurement Integrity Act is different from that in 5 C.F.R. § 2635. These inconsistencies could result in additional problems with enforcement.

[2] Additionally, contracts that will be used to procure services to perform procurement related functions should include specific contractual language addressing control of procurement sensitive information.

[3] This provision appears to be in lieu of the current requirement to report "possible violations." A "possible violation" is defined as a "reasonable basis to believe that a violation of the Act may have occurred. Rumor and hearsay *are not* a reasonable basis to conclude that a possible violation exists. See FAR § 3.104–4(1) (emphasis added).

Conflict of interest provisions have always represented a balancing act between protecting the Government from unethical conduct and deterring candidates from seeking positions within the Government. As the Bar of the City of New York noted in its seminal report, Conflict of Interest and Federal Service, Harvard University Press (1960), a patchwork of confusing and complex conflicts of interest provisions is a hindrance to these goals. As discussed below, the specific DoD and Department of Energy ("DoE") provisions do not add to the rational enforcement of federal ethics and their repeal need not be linked to modifications to the Act. Instead, they should be repealed in the interest of establishing a simplified, consistent body of conflict of interest provisions.

1. The DoE Organization Act Ethics Provisions Are Obsolete

Title VI of the DoE Organization Act, Pub. L. No. 95–91, §§601–608, 91 Stat. 565, 591–604 (1977) (codified as amended in 42 U.S.C. §§7211–7218 (1982)) included several conflict of interest provisions.[4] The legislative history of these provisions makes clear that the major concern of Congress in enacting these statutes was to control the activities of the commissioners of the various independent regulatory agencies which had been incorporated into DoE. Specifically, Congress sought to prevent these individuals from participating in rate-making proceedings which might affect their former employers.[5]

A year after the passage of the DoE Organization Act, Congress passed the Ethics in Government Act of 1978, Pub. L. No. 97–521, 92 Stat. 1824 (1978) which was the first major ethics legislation applicable to all three branches of Government since the Bribery, Graft and Conflict of Law Act, Pub. L. No. 87–849, 76 Stat. 1119 (1962). This Act was hailed as a "general standard for what is to be considered proper ethical conduct by former government officials." In the Ethics in Government Act, Congress imposed on all Government employees[6] many restrictions similar to those found in the DoE Organization Act. Congress, however, failed to repeal the DoE Organization Act conflict of interest provisions at that time.[7] It is clear, however, that as of 1978, the ethics provisions of the DoE Organization Act had become a legislative anachronism.

Congress finally corrected what can only be considered a legislative oversight with the passage of the Ethics Reform Act of 1989, Pub. L. No. 101–194, §507, 103 Stat. 1716 (1989), which provides:

> The following provisions of law shall have no force or effect [for one year after enactment] . . . (4) Sections 603 through 606, Subsections (a) and (b) of Section 607 and Subsection (a) and (c) of Section 608 of the [DoE] Organization Act.

Id.

It is clear that the DoE Organization Act ethics provisions would have been repealed outright if Section 507 had not addressed the Procurement Integrity Provisions of the Office of Federal Procurement Policy Act (the "OFPP Authorization Act") (41 U.S.C. §423).[8] In a last minute compromise, section 507 was revised to merely suspend operation rather than repeal the laws addressed in that section. This change was the result of concerns expressed by several Senators over the repeal of the Procurement Integrity Provisions of the OFPP Authorization Act. The Congressional Record contains no similar sentiments for Title VI of the DoE Organization Act.

The DoE Organization Act ethics provisions no longer serve a legitimate Government interest. Instead, they are merely an additional barrier for both Government

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[4] These provisions were the result of efforts by various public interest groups which saw the DoE Organization Act as the first major opportunity following Watergate to impose new ethical standarts on Government employees. Specifically addressed were financial disclosure requirements (42 U.S.C. §7213); asset divestiture requirements (42 U.S.C. §7212); employment restrictions (42 U.S.C. §7215); and pre- and post-employment reporting requirements (42 U.S.C. §§7214, 7215).

[5] Congress noted that many of these commissioners left a utility for a two or three year tour as a regulator, then returned to their former employers.

[6] Specifically, financial disclosure and senior level employee post employment restrictions were included in the Ethics in Government Act.

[7] Instead, DOE was left to administer both its overlapping and inconsistent provisions and the Ethics in Government Act provisions. Compare 18 U.S.C. §207(c) with 42 U.S.C. §7215. No fundamental purpose is served by the differences between the two statutes.

[8] The provisions of Pub. L. No. 101–194 were based on H.R. 3660, and were passed without a conference report. Pub. L. No. 101–194, 103 Stat. 1716 (1989). H.R. 3660, §507 proposed repeal rather than suspension of these duplicative and unnecessary conflict of interest provisions.

employees and industry.[9] As Congress recognized in 1989, these provisions should be repealed.

2. The DoD Conflict of Interest Provisions Should be Repealed

During the height of the Reagan defense buildup, Congress became increasingly concerned with improprieties in DoD procurements and the revolving door between industry and the Pentagon. Like the DoE provisions discussed above, Congress decided to address these issues only for one agency. The DoD Authorization Act for FY86 and 87, Pub. L. Nos. 99–145 and 99–661, included three provisions intended to dose the "revolving door" between the defense industry and the Pentagon. The first of these provisions, 10 U.S.C. §2397a, requires DoD procurement officials to report any contacts made by defense contractors regarding employment opportunities. Failure to report such contacts could result in a ten-year ban on an employee accepting employment with that contractor.

Second, 10 U.S.C. §2397b is a comprehensive two year ban, preventing DoD procurement officials from accepting employment with a contractor where a majority of that official's time was spent at the contractor's facility or a majority of the official's time was spent working on a major weapons system procurement that involved any "personal and substantial" involvement with the contractor. Finally, 10 U.S.C. §2397c requires major DoD contractors to file annual reports on the current employment activities of former Government employees.

In 1988, Congress passed the Procurement Integrity Act, 41 U.S.C. §423 to address restrictions applicable to all Government procurement officials. In the Act, Congress focused on activities that might have an impact on the ability of the Government to buy goods and services through full and open competition. Bribery, gratuities and secret offers of employment to Government procurement officials, while procurement decisions were pending, not the "revolving door," were viewed as the source of the problems.

Since the enactment of 10 U.S.C. §§2397a, 2397b, and 2397c, there have been numerous initiatives to repeal these provisions as part of Government-wide ethics reform bills. Most importantly, the Ethics Reform Act of 1989 reviewed the need for these provisions. Like the DoE ethics provisions, Congress concluded that the DoD specific provisions did not add any necessary protection to the Government. Although suspended on numerous occasions, repeal of these provisions apparently has not warranted a separate legislative initiative.

The Section notes that many of the factors that initially gave rise to 10 U.S.C. §§2397a, 2397b, and 2397c are no longer applicable. The Defense budget is no longer expanding, but is instead experiencing potentially drastic cuts. As the Defense Department contracts, entire weapons system programs have been canceled. DoD employees may no longer be looking to line their pockets through employment in private industry, but may simply be attempting to keep a job. The subject provisions, however, significantly restrict the ability of DoD employees from discussing options regarding future employment with the firms that may know the most about their qualifications—i.e., the firms that they deal with on a daily basis. Furthermore, forcing these qualified DoD officials to seek employment outside of their area of expertise could have a further impact on the defense industry's ability to attract talented employees at a time when efficient management is crucial.

More importantly, the Act places limitations on procurement officials' employment "contacts" during the course of a procurement regarding employment with competing contractors on the particular contract for which the employee has responsibility. The narrower scope of these limits, which are applicable to all Government employees, makes more sense than the broad restrictions applicable only to DoD officials.

The Section 800 Committee should recommend repeal of 10 U.S.C. §§2397a, 2397b, and 2397c regardless of any actions taken on the Act. These conflict of interest provisions embodied by the sections unnecessarily restrict ability of the DoD personnel to find employment in the private sector, which is exactly what many must do given the reality of a shrinking defense budget and smaller Defense Department.

3. The Criminal Selling Provision

A final restriction that should be lifted is the criminal "Selling" provision applicable to former military officers, 18 U.S.C. §281. The 1987 changes to this provision, Pub. L. 100–180, 101 Stat. 1019 (1987), can only be classified as a mistake. When

[9] In the only case addressing this issue, the Claims Court reversed a procurement decision after rejecting DoE's interprebtion of this statute. See *TRW Environmental Safety Systems, Inc. v. United States*, 18 Cl. Ct. 33 (1989).

faced with the issue of "clarifying" or repealing this provision, Congress simply made the wrong choice.[10] There is no justification for this additional restriction for retired military officers.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

KAREN HASTIE WILLIAMS,
Chair, Section of Public Contract Law.

Mr. CLINGER. Mr. Miller, thank you very, very much. And also, I want to thank all of your colleagues for working so hard and so productively on Saturday. I think it really is striking that you achieved such unanimity on what was a very contentious area. We assure you that we are going to evaluate those recommendations very carefully to see what we can incorporate.

Mr. MILLER. Thank you. What we did was we sent five of our members out to a room for an hour and said, "You must come back with a proposal that all of us can support," and Mr. Allen was one of those five and they did a fantastic job.

Mr. CLINGER. Well, I commend you for it. It really is marvelous. Steve Daniels.

STATEMENT OF STEPHEN DANIELS, CHAIRMAN, GENERAL SERVICES ADMINISTRATION BOARD OF CONTRACT APPEALS

Mr. DANIELS. Thank you very much, Mr. Chairman.

I am very pleased to respond to your invitation to testify today in a room which has many happy memories for me from the 14 years I spent with the Republican staff of the committee.

I am here today, as you said, in my current capacity as Chairman of the GSA Board of Contract Appeals. As you know, the GSBCA is a quasi-judicial tribunal which is located within GSA but functions independently of that agency.

I am independent this morning too. The views I express are mine personally, and as you can contrast with previous speakers, don't represent the position of the administration.

I am going to speak only about Title IV of the bill, "Streamlining of Dispute Resolution." This title would make significant changes to the structure and practice under which administrative forums like the GSBCA resolve differences between Government agencies and the contractors.

My own view is that Title IV will allow us to do better work at lower cost. The bill will cut management and overhead expenses, and also permit the contract dispute resolution apparatus to respond more quickly and in a more orderly way to changes in the size and organization of Government. At the same time, the bill will make resolution of disputes on Government contracts fairer, faster, less formal, more definitive, and less subject to jurisdictional wrangling.

The bill deals with two different kinds of legal disputes: disagreements between agencies and their contractors on existing contracts, and protests by disappointed bidders against the conduct of agency procurements.

The first kind of dispute, known as contract appeals, may currently be brought in 11 different administrative forums—the

[10] A complete history of this provision is found in the section's Monograph, "Personal Conflicts of Interest in Government Contracting," ABA (1988).

boards of contract appeals located in various agencies. The second kind, protests, may now be filed in two different forums—the General Accounting Office and, for computer and telecommunications contracts, the GSBCA.

The law provides for the resolution of these disputes for an extremely important reason: maintaining the integrity of the Government procurement system. If private businessmen and women did not have confidence that agencies would deal with them fairly in contractual relationships, they wouldn't be interested in doing business with the Government. The accountability we bring to the process has profound economic benefits for contractors and agencies alike.

The GSBCA is the only administrative body which is experienced in hearing both kinds of disputes. I am confident that with this model and experience, the provisions of Title IV can be implemented with great success.

All of us in the Federal Government, Mr. Chairman, understand that we need to be creative and innovative in figuring out how to do more with less resources. H.R. 1670 cuts costs by consolidating the 12 administrative dispute resolution forums into a single entity. This would relieve many board judges and GAO attorneys of management responsibility and permit them to devote their time to more productive work. It will also allow us to reduce our overhead expenses.

Most of the 11 existing boards are very small, with three to seven judges. Over the next few years, as the Federal Government shrinks in size and significant reorganization takes place, some boards may experience significant changes in their caseloads. The consolidated board will find it much easier to adjust to these changes without harming the consideration of individual cases.

I expect that the cost savings will be accompanied by improvements in the ways in which we resolve disputes. A significant way is by eliminating the threats to the fairness of the process which are built into the current administrative structure of the forums.

Currently, one party to a case, the agency in which a board is located, is able to influence the arbiter through means that the other party, the contractor, is not. Agency officials can control a board's budget, personnel, office space and other administrative functions. The likelihood of fairness in board proceedings would be greatly enhanced by moving the boards out of their agencies and away from that control.

One other point I would like to mention is that we on the Board of Contract Appeals and of the GAO bid protest section are in the dispute resolution business, not the litigation business. Our purpose is to help people settle their differences as quickly, informally and inexpensively as possible. Often, informal alternative means of dispute resolution, or ADR, can settle differences faster and cheaper than the formal proceedings.

H.R. 1670 does what in my judgment is an excellent job of injecting ADR into Government contract disputes, while at the same time preserving the right of the parties to receive formal resolution where that is necessary.

In conclusion, Mr. Chairman, Title IV of H.R. 1670 is a bold solution to the problem of how to improve the Government's ability to

provide administrative resolution of contract disputes, while at the same time spending less money on that function.

By putting all of the Government's contract dispute resolution professionals in one place and directing them to work as informally and expeditiously as possible, you have protected and improved a vital tool for preserving the integrity of Government contracting.

Thank you.

[The prepared statement of Mr. Daniels follows:]

PREPARED STATEMENT OF STEPHEN DANIELS, CHAIRMAN, GENERAL SERVICES ADMINISTRATION BOARD OF CONTRACT APPEALS

Messrs. Chairmen and Members of the Committees: I am pleased to respond to your invitation to testify today on H.R. 1670, the Federal Acquisition Reform Act of 1995. As you know, the General Services Administration Board of Contract Appeals (GSBCA) is a quasi-judicial tribunal which is located within GSA but functions independently of that agency. I trust that you will understand, consistent with the Congress' intention that we act in an independent fashion, that the views I express this morning are mine personally and do not necessarily represent the position of the Administration.

Title IV of the bill, entitled "Streamlining of Dispute Resolution," would make significant changes to the structure and practice under which administrative forums like the GSBCA resolve differences between Government agencies and their contractors. I will restrict my statement to this portion of the bill. My own view is that title IV will allow us to do better work at lower cost. The bill will cut management and overhead expenses, and also permit the contract dispute resolution apparatus to respond more quickly, and in a more orderly way, to changes in the size and organization of Government. At the same time, the bill will make resolution of disputes on Government contracts fairer, faster, less formal, more definitive, and less subject to jurisdictional wrangling.

The bill deals with two different kinds of legal disputes—disagreements between agencies and their contractors on existing contracts, and protests by disappointed bidders and offerors against the conduct of agency procurements which result in the award of contracts. The first kind of disputes, appeals from contracting officer decisions on existing contracts, may currently be brought in eleven different administrative forums—the boards of contract appeals located in various agencies. The second kind, protests, may now be filed in two different administrative forums—the General Accounting Office and, for computer and telecommunications contracts, the GSBCA. Both types of disputes may also be taken to United States courts.

The law provides for the resolution of these disputes for an extremely important reason—maintaining the integrity of the Government procurement system. If private businessmen and women did not have confidence that agencies would deal with them fairly in contractual relationships, they would perceive a much higher risk associated with doing business with the Government. Fewer of them would want to bid on public contracts, and those that did would increase their prices and decrease the quality of the products they offer—both because they would face less competition and to account for the higher risk. The accountability we bring to the process has profound economic effects.

The GSBCA is the only administrative body which is experienced in hearing both kinds of disputes. We have been resolving appeals of contracting officer decisions since 1950, and protests since 1985. The GSBCA has demonstrated that integrating practices and procedures to deal with all kinds of contract problems improves the forum's ability to understand and deal with the whole panoply of contracting issues. The board has learned from protests, for example, to move contract appeals to resolution more quickly. And it has learned from its appeal work to bring alternative, less formal means of resolution to protests. GSBCA judges have consistently produced significantly more opinions, per judge per year, than those of any other board. I am confident that with this model and experience, the provisions of title IV can be implemented with great success.

COST SAVINGS

All of us in the Federal Government understand that we need to be creative and innovative in figuring out how to do more with less resources. H.R. 1670 cuts costs by consolidating the twelve administrative dispute resolution forums—the eleven boards of contract appeals and the GAO bid protest section—into a single entity. This will relieve many board judges and GAO attorneys of management responsibil-

ity, and permit them to devote their time to more productive work. It will also allow us to reduce our overhead expenses. Instead of twelve organizations needing twelve different computer systems and twelve different staffs or contractors to service those systems, for example, we could have a single system and a small staff to maintain and improve it.

ORDERLY RESPONSE TO CHANGES IN SIZE AND SHAPE OF GOVERNMENT

Most of the eleven existing boards of contract appeals are very small, with three to seven judges; only the GSA and Armed Services boards, with 10 and 28, respectively, are larger. Over the next few years, it appears that the Federal Government will be shrinking in size and that significant reorganization will take place. As these changes occur, some boards may experience significant changes in their caseloads. A small board will find it difficult to adjust to sudden changes, with the result of either wasted resources (where the caseload goes down) or delays in dispute resolution that impede the planning and operations of both contractors and agencies (where the caseload goes up).

A consolidated board will find it much easier to adjust to such changes without harming the consideration of individual cases. It will especially be easier for the larger board to shrink over time as the caseload drops due to reduction in the overall size of the Government, and to do so in an orderly manner.

FAIRNESS

I expect that these cost savings will be accompanied by improvements in the ways in which we resolve disputes. A significant way is by eliminating the threats to the fairness of the process which are built into the current administrative structure of the forums.

As I mentioned earlier, each of the boards of contract appeals is located within the agency whose disputes it hears. This means that one party to a case—the agency—is able to influence the arbiter through means that the other party—the contractor—is not. Agency officials have the power to control the board's budget, personnel, office space, and other administrative functions. The likelihood of fairness in board proceedings would be greatly enhanced by moving the boards out of their agencies and consequently away from that control.

The GAO bid protest function is similarly subject to the possibility of political influence. It is performed by an organization which is designed to support the Congress, not adjudicate contract cases. Further, GAO's decisions, unlike those of the boards, are not subject to judicial review.

The bill properly addresses the fairness issue by moving all the forums into their own entity, where decisionmaking will properly be subject to influence by courts, not political institutions and officials. Preserving the consolidated board's independence from agency control is critical to the success of the operation.

SPEED OF DECISIONS

H.R. 1670 cures an anomaly in the law dealing with the speed with which protests are decided. Currently, the GAO, many of whose cases are relatively simple, must decide every protest within 125 days of the date on which it is filed. The GSBCA, whose cases are generally more complex and involve larger contracts, must decide each protest filed with it within 65 days.

The bill reverses this strange allocation of time. It keeps the 65-day deadline for the bigger cases, but requires that protests of procurements valued at under $1 million be decided under expedited procedures, within only 35 days. The new deadlines are much more appropriate, and will permit the agencies to proceed with protested procurements much faster than they could before.

Some lawyers have expressed concern that if the judges on the various agency boards are required to hear protests as well as contract appeals, and decide all the protests quickly, they will address the appeals much more slowly than they do today. I can assure you that this is a false concern. The bill gives appeals involving less than $100,000 priority over protests. More important, however, the experience of the GSBCA has demonstrated that it is possible to balance the competing demands and move both kinds of disputes along quickly. As I said, the GSBCA has been hearing both varieties for more than ten years. Statistics on these matters go back only to 1989, but since that year, the GSBCA has reduced its backlog of contract disputes by sixty percent and has decreased, coincidentally also by sixty percent, the average amount of time an appeal is on the books before it is resolved. The key to this success is hard work. I see no reason why the judges on the consolidated board can't work just as hard, and with just as good results, as the judges on my board.

FORMALITY OF PROCEEDINGS

We on the boards of contract appeals and at the GAO bid protest section are in the dispute resolution business, not the litigation business. Our purpose is to help people settle their differences as quickly, informally, and inexpensively as possible.

Sometimes a disagreement is so complicated, or so close, or revolves around such a thorny legal point, that formal proceedings and decisions are not only appropriate, but also necessary. Often, however, informal, alternative means of dispute resolution (ADR) can settle differences faster and cheaper than the formal proceedings.

H.R. 1670 does what in my judgment is an excellent job of injecting ADR into Government contract disputes, while at the same time preserving the right of the parties to receive formal resolution. The bill does this in three ways.

- First, it uses the consolidated board's expertise to keep disputes from ever ripening into litigation. It does this by making the board judges—neutral individuals who are highly skilled in Government contract law—available to all agencies and their contractors, at no additional cost, for facilitating informal resolution of disputes even before they reach a formal stage.
- Second, the bill requires that in every case which is filed with the board, the judge ask the parties to attempt to settle the case through ADR before proceeding further.
- Third, the bill removes a barrier to ADR in protest cases. It does this by tolling the time limitations for as much as twenty days, as long as the parties are using ADR to settle their differences.

DEFINITIVE RULINGS

Because the GAO is in the legislative, rather than the executive or judicial, branch, whenever it concludes that a protested procurement needs fixing, separation of powers concerns prevent the decisionmaker from requiring the agency to take necessary action. GAO can only recommend a solution for the violation of law. If the agency chooses not to follow the recommendation, the protester is left with a hollow victory and the purpose of the protest process is diminished.

The bill cures this problem by moving the protest forum into the executive branch. The consolidated board, like the GSBCA, will have the power to direct an agency to take corrective action where appropriate.

JURISDICTIONAL PROBLEMS

The current split in protest authority between the GAO and GSBCA has created two jurisdictional problems, each of which has spawned litigation. First, because the GSBCA has authority to consider only those protests which involve computer and telecommunications procurements, the question of whether a procurement is really for these goods or services must sometimes be decided. Second, some protesters can lose their rights to protest due to no fault of their own, simply because each firm is permitted to go to only one forum for each procurement. If in the same procurement, company A protests to the GAO and company B protests to the GSBCA, the GAO automatically dismisses A's protest, but A may not refile its complaint at the GSBCA.

The bill eliminates these problems completely by permitting the consolidated board to hear protests involving the procurement of any goods and services by any executive agency.

CLARITY OF STANDARDS

An additional benefit of H.R. 1670 is that it prescribes clear standards to govern protest proceedings. The bill combines features of current practice before the GAO and the GSBCA. Agency actions will be presumed correct; the protester must show by a preponderance of the evidence that they violated a statute or regulation. All parties will be permitted to learn the facts pertinent to protest allegations, and to present all relevant information to the decisionmaker. Discovery will be limited, however—in all cases, it will be restricted to material relevant to protest grounds, and in smaller cases, it may be in writing only. The Board will be authorized to find violations of law only for specific reasons stated in a well-recognized statute, the Administrative Procedure Act.

CONCLUSION

Title IV of H.R. 1670 is a bold solution to the problem of how to improve the Government's ability to provide administrative resolution of contract disputes, while at the same time spending less money on this function. There is no particular reason, other than historical accident, that contract appeals and protests are heard by dif-

ferent forums, or that so many forums exist for resolving both kinds of cases. The people who hear the cases are all professionals with great training in Government contract law and a good understanding of due process. By putting them in one place and directing them to resolve disputes as informally and expeditiously as possible, you have protected and improved a vital tool for preserving the integrity of Government contracting.

Mr. CLINGER. Thank you very much, Mr. Daniels. And thank you, Mr. Miller.

Let me start out by saying the testimony earlier from a number of sources indicating that what we proposed in this bill with regard to bid protest would result in just the opposite of what you said; that is, it would result in more cases, more protests, more delays, more of the above. How would you respond to that?

Mr. DANIELS. Well, two different ways. One is that I think what you got from the previous panel was a fictionalized view of Government bid protests, particularly at the GSBCA. What you got from that panel was the view of the O.J. Simpson trial writ large as a representation of how the criminal justice system operates in America.

I don't know the facts about the specific cases the previous witnesses testified to. They may even be true. I am not going to pretend to you that we have done everything perfectly in the course of our proceedings. But from those extravagant examples, we had presented to us a view that that is the way the process always operates, and it doesn't.

I am concerned, hearing from Government witnesses, that what they are really looking to do is avoid accountability for their actions. There are problems in the Government procurement system, and it is always easier to blame other people for those problems than to take responsibility for them oneself and to work to cure them. I think what you saw today was an attempt to foist on to other shoulders the responsibility that people ought to be doing on their own. But as far as what this bill is doing, I really do believe that it would generate less rather than more litigation.

First, the emphasis on ADR would encourage in all disputes and even in the pre-dispute phase, an attempt to resolve differences informally without getting to litigation itself. And with a particular view to protests, there is built into the bill a provision for a stay of proceedings while ADR goes on in an attempt to cure one of the problems in the current system in which the clock is moving so fast that nobody even has a chance to try ADR. So I think you will see a lot of protests resolved much more informally and faster than they are now.

Even to the extent that there is litigation, the bill provides that in litigation regarding small procurements involving $1 million or less, that we would have written discovery only and a very fast time limit for a quick, unappealable decision.

In the larger cases, while it is true that in some cases there will continue to be a lot of discovery so that all of the parties can find out what really went on in the procurement, there is a clear direction to the decisionmaker to limit discovery to what is absolutely necessary, and that in itself is going to redirect the whole way in which the process is focused. So I see real benefits to what you are doing with the bill.

Mr. CLINGER. Thank you.

Mr. Miller, H.R. 1670 prohibits the knowing and willful dissemination and receipt of procurement-sensitive information and imposes severe penalties for violation of the prohibitions. The administration's proposed language has a somewhat different standard, and substantially larger penalties for violating of the prohibitions.

I wonder if you could comment on whether the standards and penalties that we have provided in H.R. 1670 are sufficient, or do you think that we should move more toward the administration's point of view, a more narrow standard and more severe penalties?

Mr. MILLER. Well, I can give you a personal opinion because our council is not—our council's comments were that these are duplicative and that they should be repealed. It is my personal opinion, not the opinion of the council, that 1670 is preferable. The way you are headed is fine.

Mr. CLINGER. OK. The other part would be a little, too draconian, really, would be unnecessary.

Mr. MILLER. Yes. And again, this is my personal opinion, this is consistent with the overall thrust of the bill to remove certificates and to get procurement people on both sides of the table involved with procurement instead of keeping track of signatures.

Mr. CLINGER. Mr. Daniels, you support the establishment of the new U.S. Board of Contract Appeals as an independent entity in the executive branch, and we are grateful for that. Do you envision that such a relatively small and vulnerable entity would encounter problems maintaining its independence in the face of pressures from Congress and the larger, more powerful executive agencies?

In other words, in the present status under GSA, there is—we are cutting you loose, in effect, we are cutting loose this thing and establishing it as an independent, freestanding agency which would be presumably subject to the winds of change or the winds of pressure and power from other entities. Do you see that as a problem?

Mr. DANIELS. I don't see that as a particular problem given the various alternatives. Right now we have a problem in that every board is inside an agency whose cases it decides, and that agency also has a great deal of administrative influence on the board, perhaps more influence on the smaller boards than on the larger ones, but the influence is there all the same in every case.

Personally I would much rather take my chances with Congress through the appropriations process, knowing full well that the Congress can cut appropriations for an entity just as it could cut appropriations for the court system. But I think that Congress, representing the taxpayers, would be a much more fair overseer of the board than the agency which represents its own interests in so many of the cases.

Mr. CLINGER. Thank you. My time is up.

Mrs. Maloney.

Mrs. MALONEY. Thank you, Mr. Chairman.

Mr. Daniels, do you support the shift away from full and open competition to maximum practicable competition?

Mr. DANIELS. Well, Mrs. Maloney, as a judge, my colleagues and I have it as our mission to interpret and enforce whatever standards you set. So——

Mrs. MALONEY. Well, given your breadth of experience in deciding bid protest cases, is it clear to you what is meant by maximum practicable competition?

Mr. DANIELS. My own personal view is that it is not clear from the bill what is meant by maximum practicable competition. I heard a lot of views earlier this morning from different people, and it seems to me that if you could write the standards so that what it really meant was that everybody would have the chance to compete, but that Government agencies would understand that they were permitted and perhaps even encouraged to eliminate from the competitive range much earlier in the process companies that didn't stand a real chance for award, that would be——

Mrs. MALONEY. Mr. Miller, would you care to comment on the definition, on the question I just asked him?

Mr. MILLER. Well, we did not address that in the council.

Mrs. MALONEY. OK, fine.

Mr. Daniels, what is your view of the wisdom of eliminating the simplified acquisition threshold for commercial items?

It currently is $100,000, and as I understand it, this bill would totally eliminate it. So if I wanted to buy a rocket and it was on the shelf, I could go out and buy the rocket on the shelf.

Mr. DANIELS. That is assuming that the rocket was on the shelf. But, yes, I have the same reading that you do.

Mrs. MALONEY. I mean, I could make a $5 million purchase if I said it was a commercial purchase.

Mr. DANIELS. And indeed there are occasions in which the Government buys hundreds of millions of dollars at a time in commercial products.

Mrs. MALONEY. Absolutely.

Mr. DANIELS. Again, my personal view is that it would make sense to place some dollar limitation on the simplified procedures for commercial items.

Mrs. MALONEY. What limitation do you think would be appropriate for the taxpayers?

Mr. DANIELS. I really don't have enough knowledge to help you with that one.

Mrs. MALONEY. Mr. Daniels, in your written testimony you indicate that the new board will have the power to direct an agency to take corrective action. However, in the bill on page 67, Section 424(f) of the bill, it could be interpreted that the board would only be able to recommend corrective action, particularly as in the context of a statutory GAO bid protest where the GAO may only recommend.

Mr. DANIELS. The bill is a little confusing in that regard, because in one sentence it uses the word "order," which is a requirement, and then——

Mrs. MALONEY. Then it uses "recommend."

Mr. DANIELS. And then in the same sentence it uses "recommend."

Mrs. MALONEY. Right.

Mr. DANIELS. It seems to me that that doesn't make sense and that the two have to be melded together. The only way for this board to operate effectively is to be able to require agencies to be——

Mrs. MALONEY. You are recommending we clarify that language; change "recommend" to "order"?

Mr. DANIELS. Or "require," one of those words.

Mrs. MALONEY. OK. Mr. Miller and Mr. Daniels, what is your response to the testimony of the Office of Federal Procurement Policy administrator that came earlier of consolidating the board that replicates the features of the GSBCA would increase lawsuits and is costly, that it would not be a good idea?

Mr. MILLER. Well, we think that the proposals we recommend will reduce lawsuits, reduce protests, reduce costs, no matter where you put the protest jurisdiction. So what we tried to do was to come up with, in the inter-workings of how these protests are run, what is it about these protests that needs to change so that no matter where you elect to put them—and we think it is a policy decision for Congress—the transaction costs associated with bid protests, the disruption of the procurement system and the disruption of businesses trying to do business with the Government is decreased.

So we think that these are the proposals that will reduce transaction costs, not the selection of a forum. And we think that that is up to you where you want to put them.

Mrs. MALONEY. Thank you very much for your testimony. And I intend to study it further. Thank you.

Mr. CLINGER. Before I recognize Mr. Horn, let me follow up on that question. Would you agree, however, that it would make sense to, rather than have sort of dual agencies or dual fora for the consideration of these issues, that it would be better to have at least a single forum?

And I agree with you the things that you are recommending are going to be necessary to accomplish what we want to accomplish, which is to reduce the number of protests and to, hopefully, have a more coherent policy. But at the moment we have two different tracks to do that. Wouldn't you agree that it might be helpful to have one forum?

Mr. MILLER. It may well be helpful. GAO was one forum for a long time. GSBCA is one forum in a particular area, and that has been in place for a long time. The CFC is one governmentwide forum. It seemed to us an interminable question and that we would never get to an answer in our group as to which of those various options are best or a combined forum.

We have several of the people in our group that would be concerned about consolidating Contract Disputes Act jurisdiction with the protest jurisdiction, and there are some comments in our testimony. We would be concerned that, essentially, what would happen is that Contract Disputes Act cases would be pushed to the back of the line.

Now there is an opportunity to move around in the system. You can go one place and have a protest decided at GAO or GSBCA, but that is not impacting your ability to get a Contract Disputes Act case resolved in one of the agency boards.

So we are a little concerned that one of the witnesses you had this morning said, look, I'm still waiting for 6 years to collect the money the Government owes me. So there are some comments in there that we think that some care has to be taken so that we don't

have like a speedy trial situation where all we have is bid protest litigation and nothing else.

Mr. CLINGER. I hear you. Thank you.

Mr. Horn.

Mr. HORN. Thank you very much, Mr. Chairman.

Mr. Miller, what is the state of the law on GAO's involvement? Have there ever been any test cases in that as to the degree which an agent of the legislative branch can decide executive branch procurement matters?

Mr. MILLER. I believe there was in the last several years. I am sure Mr. Murphy would know the ups and downs of that and the details. But my understanding is that it was upheld. Mr. Allen probably knows the answer to that.

Mr. ALLEN. I think that is why the law was changed and CICA was amended, to make the actions of GAO just recommendations to address that very issue, because it was decided there was a constitutional question there.

Mr. HORN. If there are recommendations, do we have any evidence—staff on our side or their side and you—as to whether they are followed and to what degree?

Mr. MILLER. I am aware of studies that were done when I was a young lawyer working on bid protest matters back in Boston, that I think it was a very, very tiny percentage of GAO decisions which were not followed. And my recollection is that it was less than half a percent. I would imagine Mr. Murphy would know the answer to that better than I, though.

Mr. HORN. Well, I would ask, Mr. Chairman, that the staff pursue that and we get up to date on just how effective is that process. It might well be still at that level. People say, well, I have had my chance in court; and a neutral group has said I am not going to make it. So let's just see if those data support that.

Let me ask you, Judge Daniels, you have suggested consolidation of the current boards of contract appeals; and I gather the GAO bid process into a single independent entity. And that would be independent within the executive branch technically, but it would function as an independent agency of the executive branch; is that right?

Mr. DANIELS. That's the way it is set up in the bill.

Mr. HORN. Outside of any department?

Mr. DANIELS. Correct.

Mr. HORN. And you feel that that gives sufficient independence? Or should this be somewhat of an Article III entity? Or does that just immediately make it too complex and too expensive to gain access?

Mr. DANIELS. I don't know that there is an easy answer to your question. It certainly could become something like an Article I court, although, as you suggest, one of the real benefits——

Mr. HORN. You mean an Article III court?

Mr. DANIELS. An article——

Mr. HORN. Does the judicial branch need an entity like this to resolve disputes that occur within the executive branch?

Mr. DANIELS. Certainly the boards could be placed within the judicial branch. I think that one of the real benefits of the boards right now is that you don't need to have a lawyer to appear before

the boards. And in something like a third of our cases the contractors do not have lawyers and are able to operate perfectly well without lawyers.

So, wherever you put the board, I would hope that you would ensure that it would remain an informal forum so lawyers wouldn't have to be there.

Mr. HORN. When you have an independent entity, regardless of which branch it might be located in, but the choice is Article II or III, would you then have regional divisions of that independent entity to make it more convenient for people that might have their plant on one end of the country and not have to come to Washington? Or how would you handle that?

Mr. DANIELS. Thus far, all of the boards have been located in Washington, but everyone travels to hearings wherever it is most convenient for the parties and, in particular, for the contractors.

So if everybody involved in a case is in Los Angeles and they want to have a hearing or an ADR session, the board judge would travel to Los Angeles.

Mr. MILLER. Mr. Horn, may I add just a note on that?

Part of our recommendation is that Scanwell jurisdiction be retained. Scanwell was a case decided by a district court in the District of Columbia, and I think that is very valuable to consider.

A district court judge knows exactly what the Administrative Procedure Act standard is for reviewing an agency action. The standard Dr. Kelman mentioned a few minutes ago is desirable. And in those few Scanwell cases in which I have participated, they moved quickly. The Federal court judges want to move those cases. They are not the kind of cases they will allow to consume their docket.

And it is an interesting laboratory. It provides a little bit of competition, and opportunities for people doing business with the Government to not be locked into the agency or not be locked into an administrative forum or not be locked into a court. And there are some advantages to maintaining that diversity.

Mr. HORN. Well, it an interesting point. Let me ask you, Judge Daniels, do you know the reaction of your colleagues who are heading other such contract review groups in the executive branch as to how they might feel about your proposal?

Mr. DANIELS. It's your proposal.

Mr. HORN. I know. But, basically, you have adopted it. I just wondered, since you are enthusiastic about it, have you had a chance to talk about it?

Mr. DANIELS. I have not had a chance to talk to any of them.

Mr. HORN. Let me ask staff to survey the community. Send them our proposal, not Judge Daniel's proposal. Let's find out what they think about it. I just wondered if you talked and whether you ever get together with colleagues in other similar boards.

Mr. DANIELS. Every now and then, but not in the time since this proposal became public.

Mr. HORN. Well, I guess some in Congress want to abolish the administrative conference. Maybe you can take up a new type of administrative conference with your colleagues in the room. But I think we ought to know what their views are on it.

Thank you, Mr. Chairman.

Mr. CLINGER. Thank you both, all three of you, very much for helping us today. We look forward to working with you on your many very helpful suggestions to improve the bid protest problem.

Finally, we are delighted to have back with us Mr. Robert Murphy, the General Counsel of the General Accounting Office, accompanied by Mr. Frank Conahan, Senior Defense and International Affairs Advisor, Comptroller General. And please rise if you will.

[Witnesses sworn.]

STATEMENT OF ROBERT MURPHY, GENERAL COUNSEL, GENERAL ACCOUNTING OFFICE; ACCOMPANIED BY FRANK CONAHAN, SENIOR DEFENSE AND INTERNATIONAL AFFAIRS ADVISOR TO THE COMPTROLLER GENERAL

Mr. MURPHY. Mr. Chairman, Mr. Horn, in the interest of brevity I am going to see if I can beat the lights from changing from green to yellow and expedite the hearing.

We are delighted to be here today, as usual. I am going to merely address in my oral remarks the issue of bid protests which has been discussed so much this afternoon, but of course will be prepared to respond to questions about anything which you'd like us to respond to.

An area where further streamlining and reform might reduce the cost of acquisition process is one in which we at GAO are very much familiar, bid protests. We receive about 3,000 bid protests per year.

We believe that protests can provide a relatively inexpensive check against unlawful or arbitrary decisionmaking, and we work hard to avoid needless second guessing of the discretionary business judgments made by our procurement professionals. The protest process should carefully balance the costs of oversight against the benefit to Government contractors, the Government itself and, ultimately, the taxpayers.

We discern in the proposal that you have introduced a number of provisions which we believe are intended to preserve the relatively simple and expeditious process that has evolved at GAO. We believe that there is always pressure on forums such as ours or the GSBCA to bring more procedure to the process, to bring more litigation, more discovery and more trial procedures.

Companies that feel wronged in attempting to sell goods and services to the Federal Government believe that they need the opportunity to disclose exactly what did go wrong, and it is that pressure for more procedures that is difficult to resist.

The one area which I'd like to discuss very briefly is the proposal that protests of procurements under a million dollars only involve document discovery and be decided within 35 days.

This provision, which is called an ADR process, would encompass at GAO probably about 300 protests a year. We issue about 800 protest decisions annually that go through the full range of procedures from beginning to end in which we issue a merit decision.

A million dollar threshold would only hit 37 percent of those. That means that under the bill, as currently drafted, if GAO protests were transferred to this new entity, about 500 protests would be subject to the possibility of all of the litigation and all of the dis-

covery and all of the trial practice that you heard earlier Government witnesses complain about.

Currently, we understand that there are less than 200 GSBCA cases which are subject to those procedures. If Congress elects to use a dollar value threshold for application of more intensive procedures, we suggest that it be at least $10 million.

Over the past 3 fiscal years we estimate that 25 percent, or 200 protests per year of those that go completely through the GAO process, involve procurements of over $10 million.

I will briefly say that, with respect to the American Bar Association presentation today, we think that the proposal that they presented to the committee is a statesmanlike one. We agree with virtually all of their recommendations with one major exception and that is we share with Steve Kelman a concern that the discovery and the litigation process of many of these protests may generate costs that the Government should not bear.

We would, through one mechanism or another, impose some restriction on the forum with respect to discovery. We at GAO have concluded that, for example, depositions and interrogatories are really unnecessary to provide a fair and honest determination as to whether the Government wrongfully treated the protester.

We do have hearings. We do have document discovery. But the burden of depositions and interrogatories we've determined is unwarranted. We would certainly share the administration's concern about that particular provision of the bill.

Aside from that, thank you, Mr. Chairman. And we'd be delighted to answer any questions you might have.

Mr. CLINGER. Thank you very much.

[The prepared statement of Mr. Murphy follows:]

PREPARED STATEMENT OF ROBERT MURPHY, GENERAL COUNSEL, GENERAL ACCOUNTING OFFICE

Chairman Clinger, Chairman Spence, Ms. Collins, Mr. Dellums, and Members of the Committees: I am pleased to be here to discuss H.R. 1670, the proposed Federal Acquisition Reform Act of 1995, introduced last week by Chairman Clinger, Chairman Spence, and others. Like other procurement reform proposals under consideration, H.R. 1670 is founded on a single theme: the complexity of the procurement system has resulted in unacceptably high levels of transaction costs and user dissatisfaction. We must take every opportunity to address the issues reflected in that theme. The American people deserve a federal government that costs less, and is efficient, flexible, and responsive.

Each year, our government spends about $200 billion on goods and services. Studies have shown that the government pays a substantial premium on what it buys because of government-unique requirements. And the government's own administrative system confronts our contracting officials with numerous mandates that leave little room for the exercise of business judgment, initiative, and creativity. The taxpayer today is, simply, paying too much money for too little product.

Over time, our system for acquiring goods and services has become overwrouqht with tension between the very basic goals of efficiency and fairness. The procurement system's users—the government employees who rely on it to provide the tools they need to do the government's business, and the sellers of those tools—have been sending a clear message that the system is out of balance. It is not working in everyone's interest.

The last Congress took a significant step towards addressing the tension and restoring the balance with the Federal Acquisition Streamlining Act of 1994 (FASA). The Act established a simplified acquisition threshold (SAT) and a preference for commercial items, as well as addressing a wide spectrum of issues regarding the administrative burden—on all sides—associated with the government's specialized requirements. These ranged from socio-economic laws to the government's oversight

tools, which over the years have resulted in major differences between the government and commercial marketplaces.

As required by FASA, we have been reviewing the regulatory implementation of the Act. Even before the Act was signed, the Administration assembled interagency drafting teams, which have completed the task of issuing proposed regulations for public comment. The teams will be reviewing all the comments over the next few months, and final regulations then will be issued. In addition, individual agencies have efforts underway to draft regulations, policy memoranda, and other changes needed to implement agency-unique FASA provisions. We will be reporting the results of our assessment of this process later this year.

As important as the FASA effort was, most of those involved believe that it represented a continuation rather than a culmination of reform. There are currently a number of reform proposals under discussion, in addition to H.R. 1670, such as the Administration bill, suggestions from industry groups, and provisions in the Department of Defense authorization. The proposals basically involve two issues: how to simplify the process further, and how to resolve disputes over the selection process.

H.R. 1670 contains a number of excellent ideas for improving the government's acquisition system, some of which I will address today. It is important to emphasize that although we have conducted audits and evaluations addressing virtually every phase of the acquisition system, and review almost 3,000 bid protests yearly, we do not have data or work on many of the bill's provisions. Nevertheless, it is clear that, on the whole, H.R. 1670 shares a common objective with the other reform initiatives: to allow industry to offer, and empower our acquisition professionals to acquire, maximum value for the taxpayer with the minimum of transaction costs.

SIMPLIFYING THE PROCESS

Competition

H.R. 1670 would replace the existing requirement that agencies obtain full and open competition with a requirement for "maximum practicable" competition. The effect of the change would be to state the competition requirement in terms that applied prior to the Competition in Contracting Act (CICA). Before CICA, agencies were required to solicit offers from the maximum number of qualified sources consistent with the nature and requirements of the equipment or services being procured.

Competition brings the government the benefits of the free marketplace—lower prices and higher quality. CICA was enacted after years of congressional concern that, rather than seek competition, executive agencies relied on sole-source contracts to an unacceptable extent. We recognize that some will contend that the proposed change would represent a step backward in the government's efforts to promote competition in its procurements. However, under H.R. 1670, agencies still would be required to get competition in all procurements when practicable. The real problem is that at some level of competition, the costs of administration can begin to outweigh the benefits. The issue before the Congress therefore is whether the costs incurred in requiring full and open competition in all procurements have come to outweigh the benefits. The users of the system are asking for increased flexibility in this area, and the Congress ought to give serious consideration to accommodating that request.

Commercial Items

FASA established a preference for the acquisition of commercial items and provided for an expanded exemption for such items from the requirement for certified cost or pricing data contained in the Truth in Negotiations Act (TINA). To finish the initiative, we have suggested exempting all commercial items as defined in FASA from the certified data and audit requirements of TINA and from the corresponding requirements of the cost accounting standards. This is the approach taken by H.R. 1670. We recognize that there are arguments that market forces may not have sufficient impact on some items contained within the FASA definition—those items not yet in the commercial market, but that evolve out of existing commercial items—to ensure fair and reasonable prices without the assistance of certified data. The question for the Congress is whether the impact of the free market on the basic item will be sufficient. Clearly, the more the government is willing to bear the same risks as any other large customer, the more advantage it can take of the commercial market.

FACNET

FASA established the Federal Acquisition Computer Network, or FACNET, a government-wide electronic commerce architecture that will allow firms to receive no-

tice of government acquisitions by computer and be able to submit offers in response electronically. The implementation of FACNET will transform the current cumbersome, paper-driven process into a modern, computer-based system readily accessible to government and private sector users. This should significantly reduce staff time for all parties using the system and result in substantial reduction in transaction costs.

Ensuring early implementation of FACNET will require sustained commitment of senior management, as well as continued oversight by the Congress. The Administration should be encouraged to pursue vigorously the development and implementation of full FACNET capability on the schedule set forth in FASA.

FASA made great strides in establishing the framework for testing innovative concepts through pilot programs to be conducted by the Administrator for Federal Procurement Policy. However, the requirement in FASA that the exercise of this authority be delayed until the agency proposing to conduct the test has implemented full electronic commerce—full FACNET—impedes improvements in the acquisition process. As stated earlier, FACNET is an important program that has great merit on its own, and it should be implemented as soon as possible. Testing innovations is also important and could be pursued independently. We support the provision in H.R. 1670 that would eliminate that linkage.

PROTESTS

An area where further streamlining and reform might reduce the costs of the acquisition process is one with which we at GAO are particularly well-acquainted, bid protests. We receive almost 3,000 bid protests a year. Most will agree that there is a role for oversight of the acquisition system through protests. We believe that protests can provide a relatively inexpensive check against unlawful or arbitrary decisionmaking, and we work hard to avoid needless second-guessing of the discretionary business judgments made by our procurement professionals. The protest process should carefully balance the costs of oversight against the benefits to government contractors, the government itself, and ultimately, the taxpayers.

H.R. 1670 would consolidate the two administrative forums, GAO and the General Services Board of Contract Appeals (GSBCA), along with the other 10 boards of contract appeals, in a single, all-inclusive board. First, I should say that if we were establishing a General Accounting Office today, we probably would not include bid protests as one of its functions. There is no clear relationship between GAO's audit and evaluation function and providing a quasi-judicial forum to hear a frustrated vendor's complaint that an agency failed to follow all the rules in awarding a contract. There have been proposals to lodge the function in the executive branch for as long as I can remember. There are two reasons, I believe, why GAO has continued to perform the function since the 1920's. One is the quality of our decisions. Agencies and protesters all have examples of cases they should have won. But the procurement community historically has relied on the sound analysis and fair judgment of the hundreds of men and women who have been and are now involved in the resolution of bid protests at GAO.

The second reason for bid protests at GAO is the difficulty of finding a location that can withstand pressures to increase the complexity and costs of the process. Those pressures can be high. For example, corporate managers who make bad business judgments, who misjudge the competition and fail to obtain a major contract for their company can claim that they were misled by the description of the agency's needs, or that their product was not fairly evaluated. There is really no limit to the level of discovery and intrusion into the agency's decision process desired by a firm that believes it has been wrongly treated. When such protesters can freeze the agency's ability to obtain what it needs for months, or can require 40 depositions and a 2-week trial preventing agency and the awardee's managers from performing their normal activities for weeks or months, we must ask whether the price is too high. GAO has struggled to craft procedures that balance the need to ensure that the government fairly uses the competitive system to obtain the best possible contracts with the need to keep costs of our oversight low.

We believe that it is essential that this concept of a relatively inexpensive and efficient protest process be preserved. It is from this perspective that we offer the following thoughts on H.R. 1670.

We have no comments on the proposal to combine the boards of contract appeals except to say that the costs of creating a new organization with its own overhead and administrative costs is likely to be higher than several alternatives. The Congress could, for example, merge all of the boards into what is by far the largest board, the Armed Services Board of Contract Appeals, or into the second largest board, the GSBCA, or it could place the new combined board in the Office of Man-

agement and Budget, which currently houses the Office of Federal Procurement Policy and the Cost Accounting Standards Board.

Several provisions of H.R. 1670 appear intended to preserve the best of GAO practice and to prevent the inevitable pressure that could come from within and without the new combined board to use the full range of costly and burdensome litigation, discovery, and trial procedures in bid protests. For protests of procurements under $1 million, only document discovery would be permitted and a decision would be required within 35 days. This would encompass only about 37 percent of the approximately 800 annual GAO protests that are not settled or dismissed and go completely through the process to a decision on the merits. In other words, 500 protests that now involve only document discovery and rarely require a hearing could be subject to complete litigation, discovery, and trial procedures. Currently, fewer than 200 GSBCA cases annually are subject to such process. If the Congress elects to use a dollar-value threshold for application of more intensive procedures, we suggest at least $10 million. Over the past 3 fiscal years we estimate that 25 percent, or 200 protests, per year of those that went completely through the GAO process involved procurements of over $10 million.

In addition, we suggest that to help ensure that the forum minimizes discovery in larger procurements, which often involve simple issues of fact or law, the new board should be directed to limit discovery and the use of hearings to the minimum extent necessary to resolve the issues raised in an expeditious and cost-effective manner.

The bill would not follow the current procedures applicable to GAO that allow an agency to decide when the exigencies of public need require it to proceed with a procurement while a bid protest is being considered. This is less cumbersome and expensive than requiring the forum itself to hear and decide all such issues as H.R. 1670 proposes. At GAO, agencies award about 10 contracts a year while protests are pending—out of perhaps 400 pre-award protests that are decided on the merits annually. Not once have they done so where the protest was ultimately sustained. They do proceed at a higher rate with performance of contracts that had already been awarded before the protest was filed. Successful protesters generally do not suffer in those cases because by statute GAO may not take into account costs to the government in providing a remedy. We believe that the GAO procedure presents a less costly alternative to addressing this issue.

Another area where we believe additional clarity is needed in the bill concerns the standard for review of protests. The American Bar Association will be submitting proposed language for a review standard that we believe more closely approximates the standard used by GAO. We would be happy to work with you or your staffs on this critical language.

H.R. 1670 contains other suggestions that should help reduce protests no matter what changes are made to the protest resolution system. For example, the bill would expand the new FASA debriefing process to include, where appropriate, preaward debriefings for those that have been excluded from the competitive range. This would help eliminate preaward protests that often are filed by offerors primarily because they have been given little or no information as to why their proposals were rejected.

Mr. Chairmen, this concludes my prepared statement. I would be pleased to address any questions you or the Members may have.

Mr. CLINGER. Earlier in the hearing I asked some of the industry witnesses with regard to their views of the very broad discretion that we provide in H.R. 1670. Basically, we are prepared to rely upon and trust contracting agencies to best understand what is involved in getting a fair competition for their procurements. In other words, they are better able to really define who should be involved and who perhaps would clearly not be eligible.

Do you think the agencies are up to that task? Do you think that we repose too much authority to them? There was some reluctance to accept that rather broad delegation of authority to the contracting agency. But my problem is that we wanted to provide more flexibility. We did not want to have an iron-fisted, governmentwide provision that has caused some of the problems I think we are dealing with.

Mr. MURPHY. I might say that the process began last year with FASA, and with major efforts over the last couple of years by the Department of Defense and other agencies to provide to themselves the level of discretion that they already have under the law. I think that they've done a responsible job. I think education and training is going to be key.

When you provide that level of discretion, you have to have talented, committed and well-trained procurement professionals who can assess the marketplace and who can make good, businesslike judgments. And we think that the agencies are well on their way to doing that.

Incentives, of course, are important to ensure that the personnel involved are strongly motivated to make the right decisions.

Mr. CLINGER. Thank you.

Mr. Horn. Mr. Horn, do you want to take the Chair here?

Mr. HORN [presiding]. Thank you, Mr. Chairman. If you don't mind, I will do it from here so I don't have too many to worry about in the room here.

You heard my questions, I'm sure, of the previous panel; and I was interested in your testimony as to your own feelings about the GAO role. And certainly there's a major advantage there about the parties that are contending in the executive branch. They probably feel that they get a fairer break out of the agency that is not within the executive branch, even though that administrative law type position might be as independent as one you could find anywhere.

I was just curious if you have any recent case law where the GAO role has been protested, or what is the last case where that was decided, and whether you have data as to the outcomes of those appeals. If so, could you perhaps file them with the committee for inclusion at this point in the record?

Mr. MURPHY. In the early 1980's, there were a number of questions raised about GAO's role with respect to the executive branch on a number of fronts, including our role in the Deficit Reduction Act that passed in 1984.

In 1986, there were a number of lawsuits that challenged our role in bid protests. In each case, the courts determined that it was an appropriate oversight role for a legislative branch institution. They had questions as to whether GAO could order an executive branch agency to comply with its decisions, although that was never actually decided by any court.

I think that the Congress recognized that there was some constitutional potential problem there, and the Competition Contracting Act was revised to provide that GAO would provide recommendations rather than direction to executive agencies.

Since 1984, and I guess that has been about 11 years, we've had seven incidences in which executive agencies declined to follow our recommendations. In each one of those, I think if you looked at the facts you would be very sympathetic, as we were, with their decision. As I recall, five or six out of seven involved instances in which the agency had mistakenly gone ahead and completed the contract. They already had installed or taken whatever it was that was under protest. And when they received our decision, they said, well, what are we going to do with this? We already have what we ordered. And, as a result, declined.

One of the most recent cases was last year in which the Department of Energy had been attempting to buy a telephone communications system. It had initially been protested to the General Services Board of Contract Appeals. They sustained the protest. That was appealed to the Federal Circuit. The Federal Circuit decided that the board did not have jurisdiction. It came back to us.

I think 4 years after they started out to get the telephone system we issued a decision which agreed with the GSBCA and said, yes, you were wrong. And they were in the position of having to go back and start all over again. I think their estimates of the costs of that were about $20 million. They said this is—they came over and were quite apologetic and said, you know, we really don't think we are going to be able to do that. We said, you have to do what you have to do, but we have to report that to the Congress annually. We provided a report to the Congress that that was what they were going to do.

I think that's fairly typical of those seven cases.

Mr. HORN. When an executive agency has refused to implement the decision because, they already bought it or the fence is already up or whatever it is, do they pay any damages to the aggrieved party who thought he'd won the case?

Mr. MURPHY. What the aggrieved party receives in that case is all the costs of having pursued the protest—attorneys fees, executive witness fees and that sort. They don't get damages as you might in commercial litigation, lost profits or anything of that nature.

Mr. HORN. So there is no right to go to the court of claims and expect anything?

Mr. MURPHY. No, there isn't. In the Government contract arena, that has never been statutorily provided.

Mr. HORN. Since there seems to be so few cases, would that not be an appropriate thing we ought to think about where they have that right?

Because here's the situation: I would be pretty irked if I was the person who you said all the way along I was not treated right in the procurement process. And, suddenly, because somebody doesn't know what's going on in the world, either the fence goes up or the widgets are bought, and they say, sorry, we've got what we wanted. It seems to me that there ought to be some redress to the person who thought they were doing the right thing, and the review body said you were doing the right thing, and somehow justice doesn't seem to prevail.

Mr. MURPHY. I ought to add there is one more element of damages they receive, Mr. Horn, and that is they get returned to them the cost of having prepared their bid and proposal in the first place, which in many cases is not appreciated. They really had looked forward to having the contract and the profits that flowed from it. I see no reason why Congress shouldn't look at that possibility with respect to bid protests.

Mr. HORN. This would only be in the cases we were talking about, where something happened and the agency went ahead. Because while I'm sure it doesn't happen in the Federal Government, it has been known occasionally to happen in some Government that there is a certain arrogance of view where they say I don't care

what those people said in either the equivalent of GAO or the equivalent of a GSA board. And they go ahead and do it and say, what are you going to do about it?

Seems to me we ought to take it out of the agency's budget and reimburse the person that lost.

Well, Procurement Counsel Brown, are there any other questions that the staff wishes to have asked?

Let's ask this one.

H.R. 1670 prohibits the knowing and willful dissemination or receipt of procurement-sensitive information and imposes severe penalties for violations of the prohibitions. The administration's proposed language has a different standard and larger penalties for violating the prohibition.

Can you comment on whether the standard and penalties in H.R. 1670 are sufficient or whether we should we move to a more narrow standard and increased penalties?

Mr. MURPHY. We recognize that there was a difference in the two bills on those two issues. With respect to the difference between knowing and willing and merely knowing, I think we'd have to defer to criminal lawyers and what they might think about it. The same also is true with respect to the statutory penalties. Those are both policy judgments that I don't think we at GAO have any particular expertise about.

Mr. HORN. Well, do you have expertise, having lived with this process—and we'd certainly welcome anything additional—your statement has been very good, but if there are additional comments—you sat through some of the hearings—we'd welcome your language. Because we don't want to get this into a criminal-type process.

We'd like some resolution of a dispute alternative system which saves people money in having to prepare to take that claim but can get a fairly rapid answer to resolve the dispute and get on with the business of the Government and the taxpayers.

And I was delighted to hear that you supported the language of the section on public contract law of the American Bar. That seemed to make a lot of sense. So we are going to take a very careful look at all of that language.

And we thank all of you for your helpfulness, and the record will remain open for 1 week for all witnesses. If you'd like to have sufficient documentation added to your comments, we would be glad to do it.

And we, again, thank you all for being here; and we are sorry to keep you so long but thanks for waiting us out.

With that, the meeting is adjourned.

[Whereupon, at 2:43 p.m., the committees were adjourned.]

[Additional material submitted for the record follows:]

AEROSPACE INDUSTRIES ASSOCIATION,
June 22, 1995.

Hon. WILLIAM F. CLINGER, JR.,
Chairman, Committee on Government Reform and Oversight,
2157 Rayburn House Office Building,
Washington, DC.

DEAR MR. CHAIRMAN: On February 13, 1995, the Acquisition Reform Working Group (ARWG) submitted to both the House and the Senate a package of 12 acquisition reform issues which we recommended be addressed during the 104th Congress.

Included in this package were numerous certifications and representations required either by statute or regulation. We recommended legislation which would rescind all those not specifically and directly imposed by statute. This package of issues was also included in our May 10 submission, which commented on the various acquisition reform proposals then pending before the Congress.

The substance of our legislative recommendation was included in the Federal Acquisition Reform Act of 1995 (H.R.1670). At the hearing on May 25, we promised to furnish additional information with respect to this matter of certifications and representations. We have now updated the list and analyzed each of the 107 current provisions. Our analyses and recommendations are forwarded herewith on behalf of ARWG.

This subject was also raised during the April 6, 1995, hearing before the Senate Armed Services Subcommittee on Acquisition and Technology. By copy of this letter and its enclosure, our analyses and recommendations are also being forwarded to that Subcommittee.

We appreciate your continued support of acquisition reform and look forward to working with you.

Sincerely,

LEROY J. HAUGH.

CONTRACT CERTIFICATIONS

I. NON-CLAUSE CERTIFICATIONS

1. ISSUE: FAR 4.102(d), Corporate Participation in Joint Ventures.

Discussion: When a corporation is participating in a joint venture, the Contracting Officer is required to obtain from the Corporation Secretary a certificate stating the corporation is authorized to participate in the joint venture.

Administratively imposed, this requirement is redundant to the corporation's signature on the contract, and would be rescinded by Section 302(b) of H.R. 1670.

Recommendation: ARWG concurs in enactment of Section 302(b).

2. ISSUE: FAR 9.204(a)(2), Small Business Status for Qualified Test Payments by Government.

Discussion: A prospective contractor requesting the United States to bear testing and evaluation costs under QPL, QML, QBL qualification requirements must certify as to its status as a Small Business Concern under Section 3 of the Small Business Act in order to receive further consideration.

This statutory requirement is redundant to the Small Business Concern Representation required by FAR 52.219–1.

Recommendation: Repeal.

3. ISSUE: FAR 15.804–4, Certificate of Current Cost or Pricing Data.

Discussion: When certified cost or pricing data are required under 15.804–2, the contracting officer shall require the contractor to execute a Certificate of Current Cost or Pricing Data. The certificate states that the cost or pricing data are accurate, complete, and current as of the date the contractor and the Government agreed on a price. The certificate is required as soon as practicable after price agreement is reached.

This statutory requirement is the cornerstone of TINA.

Recommendation: Retain.

4. ISSUE: FAR 16.306(d)(2), Certification of Specified Level of Effort.

Discussion: In order for the fixed fee under a Term-Form Cost Plus Fixed Fee contract to be paid, the contractor must certify that the level of effort specified in the contract has been expended.

Administratively imposed, this requirement provides a basis for payment.

Recommendation: Rescind. Contractor's signature on invoice should suffice.

5. ISSUE: FAR 19.303(c)(2), Non-Harassment Certification Connected with Appeal of Product or Service Classification.

Discussion: Any appeal of a Contracting Officer's Product/Service Classification or Small Business Size Standard Determination must contain a certification that the appeal is not being filed for the purpose of delay or harassment.

Administratively imposed, but probably unenforceable and hence meaningless. Would be rescinded by Section 302(b) of H.R. 1670.

Recommendation: The certification itself is a form of harassment of contractors and should be dropped.

6. ISSUE: FAR 19.303(c)(2)(vi), Certification Re: Copies of Appeals Forwarded to Contracting Officer.

Discussion: Any appeal of a Contracting Officer's Product/Service Classification or Small Business Size Standard Determination must include a statement certifying that copies of the appeal have been provided to the Contracting Officer.

Administratively imposed, this requirement results in unnecessary paperwork.

Recommendation: Rescind.

7. ISSUE: FAR 31.205–22, Certification of Compliance with FAR 31.205–22(d).

Discussion: Contractors must submit as part of their annual indirect cost rate proposals a certification that the requirements and standards in FAR 31.205–22 concerning unallowable/allowable legislative lobbying costs have been complied with.

Administratively imposed, this requirement has been overtaken by events and is redundant of the broader statutory requirements of 10 U.S.C. 2324 and 41 U.S.C. 256 which provide for penalties for unallowable costs, and the requirements of the clause at FAR 52.242–00.

Recommendation: Rescind.

8. ISSUE: FAR 32.304–8, Certificate on Unguaranteed Borrowings.

Discussion: If an agency allows a contractor to obtain other borrowing during a guaranteed loan period, the contractor is required to provide appropriate certificates to the guaranteeing agency, at intervals not longer than 30 days, disclosing outstanding unguaranteed borrowing.

Administratively imposed, this requirement appears to protect the government when it makes guaranteed loans to contractors. However, the burden should be on the executive branch agencies to demonstrate the need to continue this certification.

Recommendation: Rescind.

9. ISSUE: FAR 32.503–9(a)(9), Annual Certifications, Alternate Liquidation Rate.

Discussion: If a contractor requests a reduction in the liquidation rate, he must agree to certify at least annually that the alternate liquidation rate continues to meet the conditions in FAR 32.503–9. Adequate supporting information must accompany the certificate.

Administratively imposed, this requirement appears to be part of the basis for government financing through progress payments. However, the burden should be on the executive branch agencies to demonstrate the need to continue this certification.

Recommendation: Rescind.

10. ISSUE: FAR 32.805, Notice of Assignment.

Discussion: Gives suggested format for Notice of Assignment. References that the true copy of the instrument of assignment shall be a certified duplicate or photostat copy of the original assignment.

Administratively imposed, this seems to be a reasonable requirement; however, the executive branch agencies should justify its continued use.

Recommendation: Rescind.

11. ISSUE: FAR 36.205(b)(3), Certification Re: Apportionment of Indirect Costs and Profit.

Discussion: Offers in response to a solicitation for construction with a statutory cost limitation must contain a certification that the price on each schedule includes any approximate apportionment of all estimated direct costs, allocable indirect costs, and profit. This is apparently intended to discourage or preclude unbalanced bidding.

Recommendation: Rescind. Certifications of this kind are an additional checkpoint, but realistically do very little to aid either the bidder or the government.

12. ISSUE: FAR 42.1204, Agreement to recognize a successor in interest (Novation Agreement).

Discussion: Gives format for Novation Agreement with a certificate that is signed by the Secretary of the Corporation, who certifies that the agreement was authorized by the corporation's governing body and within the scope of its corporate powers. In addition to the Novation Agreement, the following are some other items that are required to be submitted to the Contracting Officer: a certified copy of each resolution of the corporate parties' boards of directors authorizing the transfer of assets; a certified copy of the minutes of each corporate party's stockholders meeting necessary to approve the transfer of assets, etc.

Administratively imposed, these requirements seem reasonable for infrequently accomplished novation agreements.

Recommendation: Retain.

13. ISSUE: FAR 42.1205, Agreement to recognize contractor's change of name.

Discussion: Gives suggested format for Change-of-Name Agreement with a certificate that is signed by the Secretary of the Corporation who certifies that the agreement was authorized by the Corporation's governing body and within the scope of its corporate powers.

Administratively imposed, this requirement seems reasonable for infrequently accomplished novation agreements.

Recommendation: Retain.

II. CERTIFICATIONS REQUIRED BY CONTRACT CLAUSES

A. DFARS Requirements

1. ISSUE: DFARS 252.209–7001, Disclosure of Ownership or Control by a Foreign Government that Supports Terrorism

Discussion: As required by statute, if such a foreign government has a significant interest in the offeror or its subsidiaries, the offeror must disclose such interest in an attachment to its offer.

The requirement begs the question as to who supports terrorism, and other questions of definition and enforceability. Foreign control of a U.S. firm can be easily ascertained without this certification.

Recommendation: Repeal.

2. ISSUE: DFARS 252.216–7000, Economic Price Adjustment—Basic Steel, Aluminum, Brass, Bronze or Copper Mill Products.

Discussion: Administratively imposed, the clause requires a contractor to warrant that the unit price is not in excess of the contractor's established price as of the date of the bid opening for like quantities of the same item, (2) requires the contractor to certify each invoice that the price reflects all decreases required by the clause, or certify on the final invoice that all decreases have been applied as required.

Although the requirement seems reasonable, its value is questionable. This provision should be rescinded by Section 302(b) unless DoD can justify continuing it.

Recommendation: Rescind.

3. ISSUE: DFARS 252.219–7000, Small Disadvantaged Business Concern Representation (DoD Contracts).

Discussion: The clause implements a statute and requires that an offeror certify to its status as an SDB, whether SBA has made such a determination and when, and whether circumstances regarding that determination have changed.

This could be accomplished by checking a box to indicate type of business firm, i.e., large business, SB, SDB, etc. The certificate is of questionable value.

Recommendation: Repeal.

4. ISSUE: DFARS 252.211–7012, Certifications—Commercial Items—Competitive Acquisitions; Alternate I; DFARS 252.211–7013, New Material—Commercial Items; DFARS 252.211–7017, Certifications of Technical Data and Computer Software; DFARS 252.211–7020, Business Type Certification—Commercial Items

Discussion: These clauses implement Section 824(b) of Public Law 101–189, dealing with acquisition of commercial items; Section 8002(f) of the Federal Acquisition Streamlining Act of 1994 provides that Section 824(b) of P.L. 101–189 ceases to be effective on the date that the commercial item implementing regulations take effect.

Recommendation: No action is necessary because these clauses will be automatically superseded.

5. ISSUE: DFARS 252.225–7000, Buy American—Balance of Payments Program Certificate; DFARS 252.225–7006, Buy American Act—Trade Agreements—Balance of Payment Program Certificate

Discussion: 252.225–7000 requires the offeror to certify that end products other than those specified are domestic end products. 252.225–7006 is similar, but requires identification of "US made end products" which do not meet the definition of "domestic end product" and certain other categories of products. Since the purpose of the Buy American Act is to create a preference for domestic or US made end products, there must be a mechanism for an offeror to identify the extent to which its products qualify. The certifications do not appear to be required by statute, and in any case should not apply to procurement of commercial items.

Recommendation: Amend the Buy American Act to exempt commercial items from the component content requirement.

6. ISSUE: DFARS 252.225–7009, Duty Free Entry—Qualifying Country End Products and Supplies

Discussion: Implementing the Buy American and Balance of Payments statutes, the clause requires the contractor to warrant and certify on Customs forms that all qualifying country supplies are intended to be delivered to the government or be incorporated in the end items to be delivered, and the contractor will pay duty on any supplies diverted to nongovernmental use.

The warranty and certification implements the underlying statutes, but does not appear to be justified. There are less burdensome ways to comply with the statute. In any case, it duplicates the clause at FAR 52.225–10.

Recommendation: Rescind.

7. ISSUE: DFARS 252.225–7010, Duty Free Entry—Additional Provisions

Discussion: It also implements the Buy American and Balance of Payments statutes. The clause requires the contractor and subcontractor, whether their orders are placed directly with a foreign supplier, or as a subcontractor purchase order with a domestic concern, to warrant and certify on Customs forms that all qualifying country supplies are intended to be delivered to the government or be incorporated in the end items to be delivered, and the contractor will pay duty on any supplies diverted to nongovernmental use.

The warranty and certification implements the underlying statutes, but does not appear to be justified. There are less burdensome ways to comply with the statute.

Recommendation: Rescind.

8. ISSUE: DFARS 252.225–7018, Notice of Prohibition of Certain Contracts with Foreign Entities for the Conduct of Strategic Defense Initiative RDT&E

Discussion: Required by statute, the offeror must certify whether it is a U.S. firm. It would be much less burdensome to require non-U.S. firms to certify that they are not U.S. firms.

Recommendation: Amend the statute to require certification only by non-U.S. firms.

9. ISSUE: DFARS 252.225–7031, Secondary Arab Boycott of Israel

Discussion: Required by statute, the clause requires that offerors certify that they do not comply with the boycott or take any action related to the boycott. This certification, like many others, adds more politico-economic clutter to government contracts, and does not appear to serve any practical purpose.

Recommendation: Repeal the statutory requirement.

10. ISSUE: DFARS 252.226–7001, Historically Black College or University and Minority Institution Certification

Discussion: Implementing the statute, the clause requires such institutions to so certify to qualify for preferential contract set-asides. However, ARWG questions the need for a separate certification. Merely checking a block on the bid or proposal should suffice to identify the bidder or offeror as an HBCU/MI.

Recommendation: Repeal the statutory requirement.

11. ISSUE: DFARS 252.227–7012, Patent License and Release Contract

Discussion: This clause is optional for contracts involving patent releases, license agreements and assignments. It does not require the contractor to provide a certification. Instead, it requires the contractor to provide a warranty stating that it has the right to grant the license and release, and grants the Government an irrevocable, nonexclusive and nontransferable license under the patent. In addition, the contractor agrees to release all claims against the Government for any past infringement of the patent.

Recommendation: The provision is optional and appropriate where the contractor is licensing or releasing rights to the Government. Retain.

12. ISSUE: DFARS 252.227–7013, Rights in Technical Data and Computer Software; DFARS 252.227–7013, Rights in Technical Data and Computer Software—Alternate I; DFARS 252.227–7013, Rights in Technical Data and Computer Software—Alternate II

Discussion: The clause, but not the certification requirement contained therein, is required by 10 U.S.C. §2320. The clause is required to be included in solicitations and contracts that require the delivery of technical data or computer software. The clause requires the contractor to notify the Contracting Officer of its, or its subcontractor's, use of items, components or processes, or computer software that either has been developed in whole or in part, at private expense, or embodies technology that has been developed exclusively with Government funds which the contractor desires exclusive rights to commercialize. The contractor is required to certify that the claims set forth in the notification are current, accurate and complete.

Alternate I does not modify the certification requirement contained in the basic clause. Alternate I merely adds a paragraph regarding the publication of technical data for sale by the contractor.

The Alternate II clause is required by 10 U.S.C. §2320, 15 U.S.C. §638, the Small Business Innovation Research Program, and 37 C.F.R. 401. Alternate II is mandatory for contracts awarded under the Small Business Innovation Research Program which require delivery of technical data or computer software. It does not modify the certification requirement contained in the basic clause.

Recommendation: The certification requirements should be eliminated. They are unnecessary and redundant as the Government has adequate remedies available under the False Statements Act 18 U.S.C. 1001.

13. ISSUE: DFARS 252.227–7028, Requirement for Technical Data Representation

Discussion: Both the clause, and the requirement for a contractor representation contained therein, are required by 10 U.S.C. § 2320(b)(1). The clause is mandatory for contracts when delivery of technical data is expected. It does not require a contractor to submit a certification. Instead, it requires a contractor to submit with its offer a representation as to whether the contractor has or will deliver to the Government under any other contract, the same or similar technical data as included in its current offer.

Recommendation: This certification requirement is unnecessarily burdensome. It requires a contractor to review all of its contracts with the Government to determine what technical data, if any, the contractor has provided or will be providing to the Government. The certification should be rescinded.

14. ISSUE: DFARS 252.227–7036, Certification of Technical Data Conformity

Discussion: This clause requires a contractor to certify that the technical data delivered is complete, accurate, and complies with all requirements of the contract.

Recommendation: This certification should be repealed. It is redundant and unnecessary. The Government already has remedies available under the False Claims Act, 31 U.S.C. § 3729, for the knowing submission of a claim for payment for defective products or data.

15. ISSUE: DFARS 252.227–7037, Validation of Restrictive Markings on Technical Data

Discussion: Both the clause, and the certification requirement contained therein, are required by 10 U.S.C. § 2321. The clause is required to be included in all solicitations and contracts which require the delivery of technical data. The clause provides that if the Contracting Officer challenges the validity of any restrictive marking, the contractor must respond in writing justifying the validity of the restrictive marking. The contractor's written response is considered a claim within the meaning of the Contract Disputes Act of 1978, 41 U.S.C. 601 et. seq., ("the Contract Disputes Act") and is required to be certified as such.

Recommendation: This certification requirement serves no useful purpose, and should be repealed.

16. ISSUE: DFARS 252.233–7000, Certification of claims and requests for adjustment or relief

Discussion: This clause is established pursuant to PL 102–484, Section 813. The clause requires a contractor to submit a certification with any contract claim or request for equitable adjustment to contract terms or other similar request exceeding $100,000. The contractor is required to certify that the claim is made in good faith, that the supporting data is accurate and complete to the best of its knowledge or belief, and that the amount requested accurately reflects the contract adjustment for which it believes the Government is liable. The certification requirement does not apply to requests for routine contract payments, or where a certification that satisfies the certification requirements of the Contract Disputes Act, has already been provided.

Recommendation: This certification requirement overlaps with the certification requirements in the Contract Disputes Act and the Truth in Negotiations Act, 10 U.S.C. § 2306a, 41 U.S.C. § 254(d), is therefore unnecessary, and should be repealed. There is no need to have the contractor certify a request for equitable adjustment, because if the parties are able to reach an agreement, the contractor will have to certify the agreement on price. Alternatively, if the parties are unable to reach an agreement, the contractor will have to certify its claim.

17. ISSUE: DFARS 252.236–7006, Cost Limitation

Discussion: This clause is required to be included in fixed-price construction solicitations and contracts if the solicitation bid schedule contains one or more items subject to statutory cost limitations, provided no waiver has been granted. The clause provides that by signing its offer, the contractor certifies that each price stated on items subject to a cost limitation includes an appropriate apportionment of all costs, direct and indirect, overhead and profit.

Recommendation: The certification requirement should be repealed. In the case of negotiated contracts, the subject matter is already addressed in other statutory regimes such as the Truth in Negotiations Act, 10 U.S.C. § 2306a, 41 U.S.C. § 254(d) and other regulations prescribed by the Cost Accounting Standards Board. In the case of a sealed bid procurement, the contractor's costs are of no concern to the Government because of the presence of substantial competition.

18. ISSUE: DFARS 252.237–7011, Preparation History

Discussion: This clause is required for solicitations and contracts for mortuary services. The clause requires the contractor to provide a certificate identifying the results of the embalming process.

Recommendation: Rescind. Whatever forms an undertaker is normally required to fill out should suffice, without requiring a special certification.

19. ISSUE: DFARS 252.239–7007, Cancellation or Termination of Orders—Common Carriers

Discussion: This clause is required for solicitations and contracts for telecommunication services. The clause provides that if the Government cancels any of the services ordered under the contract, the Government shall reimburse the contractor for its reasonable costs incurred. In the course of settling the contractor's costs, the contractor may be required to provide the Contracting Officer with certified inventory schedules covering all items of property or facilities in the contractor's possession.

Recommendation: Rescind the certification requirement.

20. ISSUE: DFARS 252.239–7011, Special Construction and Equipment Charges

Discussion: This clause is required for solicitations and contracts for telecommunication services when the acquisition includes, or may include, special construction. The clause requires the contractor to represent that: (1) recurring charges do not include in the rate base any costs that have been reimbursed by the Government to the contractor; and (2) depreciation charges are based on only the cost of facilities and equipment paid by the contractor and not reimbursed by the Government.

Recommendation: This "representation" by the contractor is not warranted and should be rescinded.

21. ISSUE: DFARS 252.242–7001, Certification of Indirect Costs

Discussion: Both the clause, and the certification requirement contained therein, are required by 10 U.S.C. § 2324(h)(1). The clause is required to be included in all contracts and solicitations which provide for interim reimbursement of indirect costs, establishment of final indirect cost rates, and contract financing that includes interim payment of indirect costs. It requires the contractor to certify any proposal to establish or modify billing rates or to establish indirect cost rates. The contractor must certify that all costs included in the proposal to establish billing or final indirect cost rates are allowable costs and that all costs are properly allocable to defense contracts. The certification is signed under penalty of perjury.

Recommendation: This certification requirement should be repealed. It is redundant and unnecessary as the Government already has adequate remedies under the False Claims Act, 31 U.S.C. § 3729 and the False Statements Act, 18 U.S.C. § 1001.

22. ISSUE: DFARS 252.246–7001, Warranty of data; DFARS 252.246–7001, Warranty of data—Alternate I; DFARS 252.246–7001, Warranty of data—Alternate II.

Discussion: Both the clause, and the warranty provision contained therein, are required by 10 U.S.C. § 2320(b)(7)(8). The clause is to be inserted in contracts where there is a need for greater protection or a longer period of warranty than provided for in the standard "Inspection" clauses. The clause does not require a contractor to provide a certification. Instead, it requires a contractor to warrant that all technical data delivered under the contract will, at the time of delivery, conform with all requirements of the contract. The warranty extends for three years after completion of the delivery of data or any longer period specified in the contract. The warranty applies notwithstanding inspection and acceptance by the Government and notwithstanding any provision in the contract regarding conclusiveness of acceptance.

Alternate I to be used to modify the basic warranty of data clause when an even greater warranty is desired and a fixed price incentive contract is contemplated. Alternate I does not modify the contractor's warranty of data as set forth in the basic clause. It modifies the remedies available to the Government in the event the contractor breaches the warranty.

Alternate II is to be used when an even greater warranty is desired and a firm fixed price contract is contemplated. Alternate II does not modify the warranty requirement as set forth in the basic clause. Instead, it modifies the remedies available to the Government in the event the contractor breaches the warranty.

Recommendation: This certification requirement was included in statute at a time when the government determined that more competition was needed for replenishment parts. It does not serve a useful purpose and should be repealed.

23. ISSUE: DFARS 252.247–7001, Price adjustment.

Discussion: This clause is required for solicitations and contracts involving stevedoring services when using sealed bidding. The clause requires the contractor to include with the final invoice submitted under the contract, a certification that the contractor has not experienced a decrease in rates of pay for labor or that the contractor has given notice of all such decreases. It begs the question why any certification with respect to labor rates is justified after award based on sealed bid competition.

Recommendation: Rescind.

24. ISSUE: DFARS 252.247–7022, Representation of extent of transportation by sea.

Discussion: This clause, but not the representation requirement contained therein, is required by 10 U.S.C. § 2631, Cargo Preference Act of 1964. The clause is required to be included in solicitations for transportation of supplies by sea, except those for direct purchase of ocean transportation services or purchases that do not exceed $25,000. The clause does not require the contractor to provide a certification. It merely requires the contractor to represent whether transportation of supplies by sea is anticipated under the resultant contract.

Recommendation: This requirement, while seemingly innocuous, is another non-value added burden which should be repealed.

25. ISSUE: DFARS 252.247–7023, Transportation of supplies by sea.

Discussion: This clause, but not the certification requirement contained therein, is required by 10 U.S.C. § 2631, Cargo Preference Act of 1964. It is required to be included in solicitations for transportation of supplies by sea, except those for direct purchase of ocean transportation services or purchases that do not exceed $25,000. The clause requires the contractor to provide with its final invoice a representation that to the best of its knowledge and belief: (1) no ocean transportation was used; (2) ocean transportation was used and only U.S. flag-vessels were used; or (3) ocean transportation was used, and the contractor had the written consent of the Contracting Officer for all non U.S. flag-vessels.

Recommendation: This is a subject matter which is best addressed by use of specific contract terms and requirements prohibiting certain activity. The requirement for a certification is superfluous and should be rescinded.

B. FAR Requirements

1. ISSUE: FAR 52.203–2, Certification of independent price determination.

Discussion: This clause is generally required to be included in solicitations for firm fixed price contracts or fixed price contracts with economic price adjustments. The contractor must certify that the prices in its offer have been arrived at independently, and that the prices have not been, and will not be, disclosed to any other competitor before bid opening in the case of a sealed bid solicitation, or contract award, in the case of a negotiated solicitation.

Recommendation: The certification requirement is a declaration of honesty which adds nothing to the remedies available to the government in the event of price fixing or collusion. It should be rescinded.

2. ISSUE: FAR 52.203–4, Contingent fee representation and agreement.

Discussion: Both the clause, and the warranty provision contained therein, are required by 10 U.S.C. § 2306(b), and 41 U.S.C. § 254(a). The clause is required to be included in all solicitations except those excluded by FAR 3.404(b). It does not require the contractor to provide a certification. Instead, the clause requires the contractor to represent whether the contractor has agreed to pay a commission to any person other than a bona fide employee for efforts to obtain the contract that is contingent upon the award of this contract.

Recommendation: This provision is unnecessary and overlaps the coverage of the FAR 52.203–5, "Covenant Against Contingent Fees" clause. It should be repealed.

3. ISSUE: FAR 52.203–5, Covenant against contingent fees.

Discussion: Both the clause, and the warranty provision contained therein, are required by 10 U.S.C. § 2306(b); 41 U.S.C. § 254(a). It is to be inserted in all solicitations and contracts. The clause does not require any certification. Instead, by signing the contract the contractor warrants that no person or agency has been employed or retained to solicit this contract for a contingent fee, except a bona fide employee or agency. For breach of this warranty, the Government has the right to annul the contract without liability or to deduct from the contract price the full amount of the contingent fee.

Recommendation: None.

4. ISSUE: FAR 52.203–8, Requirement for certificate of procurement integrity; FAR 52.203–8, Requirement for certificate of procurement integrity—Alternate I; FAR 52.203–9, Requirement for certificate of procurement integrity—Modification.

Discussion: Both the clause, and the certification requirement contained therein, are required by 41 U.S.C. § 423(e). The clause is to be included in all solicitations where the contract is expected to exceed $100,000. The contractor is required to certify it has no information about any violation, or any possible violation of the Procurement Integrity Act, 41 U.S.C. § 423. If the contractor does have information about a violation, it must disclose it to the Contracting Officer and certify that all the information has been disclosed. In addition, the contractor must certify that all of its officers, employees and agents, who participated personally and substantially in the procurement, have certified to the contractor that they are familiar with the conduct prohibited under the Procurement Integrity Act and will report immediately to the contractor about any violations or possible violations. A contract award or

modification may not be made unless the competing contractor certification, duly executed by the officer or employee responsible for the offer, or modification, has been filed.

Alternate I is to be used for procurements using other than sealed bidding procedures. Alternate I does not change the certification language contained in the basic clause.

The 52.203–9 is to be included in all modifications to contracts which do not already contain the clause, when the modification is expected to exceed $100,000. This clause contains the same basic provisions as FAR 52.203–8.

Recommendation: This certification is extremely burdensome. The basic requirements of the Procurement Integrity Act apply and control the contractor's actions even without the certification. Accordingly, the requirement for a certification should be repealed.

5. ISSUE: FAR 52.203–11, Certificate and disclosure regarding payments to influence certain federal transactions.

Discussion: Both the clause, and the certification requirement contained therein, are required by 31 U.S.C. § 1352, "The Byrd Amendment". It is required for solicitations expected to exceed $100,000. The contractor is required to certify that no federal appropriated funds have been paid to any person for attempting to influence any member of any agency or Congress in awarding a grant, loan or contract. If any such funds have been paid or will be paid, the contractor is required to complete and submit with its offer a specified form disclosing lobbying activities.

Recommendation: The certification requirement should be repealed. The Byrd Amendment requirement are overbroad and ineffective. It should be revised to target specific and limited governmental interests.

6. ISSUE: FAR 52.204–2, Security requirements.

Discussion: This clause, but not the certification requirement contained therein, is required by 50 U.S.C. § 401. The clause is required for contracts that may require access to classified information. The contractor is required to execute Department of Defense Security Agreement, DD Form 441, certifying that it will provide and maintain a system of security within its organization in accordance with the Department of Defense Industrial Security Manual for Safeguarding Classified Information.

Recommendation: The certification requirement is unnecessary and should be rescinded. The security requirements it addresses are part of the terms of the contract and the Government has adequate remedies under those terms.

7. ISSUE: FAR 52.208–2, Jewel bearings and related items certificate.

Discussion: This clause, but not the certification requirement contained therein, is required by PL 90–469. The clause is required to be included in all contracts that may involve items in the federal supply classes as set forth in FAR 8.203(1)(b). The contractor is required to certify whether: (1) any jewel bearings or related items will be incorporated into any item covered by the contract; (2) that it will order any required jewel bearings from the William Langer Plant, Rolla, North Dakota; and (3) that if this plant is unable to supply any needed items, the contractor will procure them from domestic manufacturers.

Recommendation: This requirement should be rescinded. If the Department of Defense decides that national security requires protection of certain industries, that determination should be handled in a more comprehensive manner. Requiring certifications for specific industries is unnecessary and burdensome.

8. ISSUE: FAR 52.209–3, First article approval—Contractor testing—Alternate I; FAR 52.209–4, First article approval—Government testing—Alternate I.

Discussion: Alternate I adds a certification requirement to the basic clause. The clause requires the contractor to produce both the first article and the production quantity at the same facility and submit a certification to this effect with each first article.

Recommendation: The certification requirement is unnecessary and should be rescinded. The subject matter is already enforceable under the terms of the clause.

9. ISSUE: FAR 52.209–5, Certification regarding debarment, suspension, proposed debarment, and other responsibility matters.

Discussion: This clause, but not the certification requirement contained therein, is required by OFPP Policy Ltr. 82–1, 24 June 1982. The clause is required to be included in solicitations where the contract value is expected to exceed $25,000. The contractor is required to certify whether: (1) it is presently debarred, suspended or proposed for debarment; (2) it has been convicted of or had a civil judgment rendered against it for fraud or a criminal offense in connection with attempting to obtain a public contract within the last three years; or (3) it is presently indicted for certain enumerated offenses.

Recommendation: Rescind the certification. Contracting officers can and should check the list of debarred suspended or otherwise ineligible offerors. The certificate does not give the government any protection or rights it does not already have.

10. ISSUE: FAR 52.209–7, Organizational conflicts of interest certificate—Marketing consultants.

Discussion: This clause is required to be included in solicitations, other than sealed bids, if the contract amount is expected to exceed $200,000. The clause provides that a contractor that employs marketing consultants in connection with a contract, shall submit two certificates. The first certificate must contain specified information regarding the marketing consultant, and a statement that the certifier has advised the consultant of the existence of FAR Subpart 9.5 and OFPP Letter 89–1. In addition, the contractor must furnish a certificate executed by each consultant stating that the consultant has been told of the existence of FAR Subpart 9.5 and has not provided an unfair competitive advantage to the prime contractor with respect to the services rendered.

Recommendation: Rescind the certification requirement. A contract provision which alerts the contractor to potential conflicts of interest is sufficient. Certification adds unnecessary paperwork.

11. ISSUE: FAR 52.209–8, Organizational conflicts of interest certificate—Advisory and assistance services.

Discussion: This clause is required to be included in solicitations for advisory and assistance services if the contract amount is expected to exceed $25,000. The contractor is required to provide a certification and a description of the nature of services to be rendered on the contract, the name and description of work rendered to other clients within the last twelve months if services were rendered respecting the same subject matter as the instant solicitation. In addition, the contractor must certify that no actual or potential conflict of interest or unfair competitive advantage exists with respect to the advisory and assistance services to be provided in connection with the instant contract.

Recommendation: This certification does not serve any useful purpose and should be rescinded.

12. ISSUE: FAR 52.210–5, New material.

Discussion: The clause is required to be included in solicitations and contracts for supplies, unless, the Contracting Officer determines the clause would serve no useful purpose. The clause does not require a contractor to submit a certification. The clause by its own terms states that the contractor represents that the supplies and components identified under the Used or Reconditioned Material Residual Inventory, and Former Government Surplus Property clause of the contract are new, including recycled, and are not of such age or so deteriorated as to impair their usefulness of safety.

Recommendation: This clause should be revised to set forth a substantive contract requirement, without any reference to "representation".

13. ISSUE: FAR 52.213–1, Fast payment procedure.

Discussion: The clause establishes a fast payment procedure which allows for expedited payment for purchases that do not exceed $25,000 (higher dollar limitations may be made on a case-by-case basis). Under this procedure, payment is processed upon the agency's receipt of the invoice without the need to wait for inspection and formal acceptance of the goods. In return, the contractor is required to execute a certification representing that the goods have been shipped in accordance with the contract in the quantities shown on the invoice and of the quality designated by the contract.

Recommendation: The certification serves no useful purpose. The contractor's signature on the invoice is sufficient representation that shipment has been made.

14. ISSUE: FAR 52.214–2 Type of Business Organization—Sealed Bidding

Discussion: This is a requirement imposed by regulation, prescribed by FAR 14.201–6(b)(2). Its purpose is to advise the Government as to the nature of the entity responding to an Invitation for Bids (IFB). The bidder, by checking the appropriate box, represents that it is either a corporation, individual, partnership, nonprofit organization, or a joint venture.

Recommendation: This information does not appear to serve any useful purpose in a solicitation and should be deleted.

15. ISSUE: FAR 52.214–14 Place of Performance—Sealed Bidding

Discussion: This is a requirement imposed by regulation, prescribed by FAR 14.201–6(h). Its purpose is to advise the government as to the intended site of contract performance, or sites, if different from the address of the bidder.

It is a representation of a present intention. Since in sealed bid advertised procurement it is not uncommon for the Government to consider transportation costs

from the FOB point of origin to the user in the evaluation of low bid this information is of the Government.

Recommendation: Retain.

16. ISSUE: FAR 52.214–17 Affiliated Bidders

Discussion: This is a requirement imposed by regulation, prescribed by FAR 14.201–6(k). It requires a bidder to submit an affidavit stating that it has no affiliates, or additional information as to the names and addresses of all affiliates and all persons and concerns exercising control or ownership of the bidder and any or all of its affiliates. In addition, the nature and source of such control must be defined.

This requirement imposes a burden on large numbers of bidders, to elicit information which should be available to the contracting officer when needed, from other sources. At most, the agency should only be interested in the status of the successful offeror.

Recommendation: Rescind.

17. ISSUE: 52.214–20 Bid Samples

Discussion: This is a requirement imposed by regulation, prescribed by FAR 14.201–6(o)(1). The provision issues in Invitations for Bid (IFBs) which require the concurrent submission of a bid sample.

Alternative I deals with the situation in which the Contracting Officer may waive the requirement for bid samples even though production will not be in the same plant in which a previously accepted product was produced.

Alternative II addresses the situation where the waiver must be limited, given the nature of the product, so as to apply only to a product produced at the same plant in which the product previously accepted was produced.

To this end, the bidder is obliged to make representations, and provide pertinent information, to enable the Contracting Officer to make the appropriate determination in those instances in which waiver from the bid submission requirement is sought.

Recommendation: Retain.

18. ISSUE: FAR 52.214–21 Descriptive Literature—Alternate I

Discussion: FAR 14.201–6(p)(1) prescribes the inclusion in an Invitation for Bids (IFB) the requirement for descriptive literature if needed to evaluate the technical acceptability of an offered product, and such information is not otherwise readily available.

Alternate I addresses the situation where a previously supplied product may negate the Government's need for the submission of the descriptive literature, in which case the Contracting Officer could waive the requirement. To request such waiver, the bidder is required to represent that the previously supplied product is the same as that now being offered, and to provide pertinent information as to the circumstances under which it was previously supplied. This information is needed by the Contracting Officer.

Recommendation: Retain.

19. ISSUE: FAR 52.214–27 Price Reduction for Defective Cost or Pricing Data—Modifications—Sealed Bidding

Discussion: This imposes a statutory requirement: 10 USC 2306a(9a), 10 USC 2306a(b), 10 USC 2304a(d), and 10 USC 2304a(e)(1). The pertinent regulatory implementation is found at FAR 14.201–7(b). It applies to modification(s) of existing contracts.

In those instances in which the Government is seeking a reduction in contract price pursuant to this clause, the contractor may offset against any such reduction certain increased costs not reflected in the cost or pricing data submitted to the government. However, this right is circumscribed and may be exercised only under certain designated conditions. It is required that the contractor certify to the Contracting Officer that, to the best of its knowledge and belief, it is entitled to the offset in the amount claimed.

"Entitlement" is a subjective term and really is not determined until after-the-fact." The mere submission of a request for offset, it would seem should suffice to reflect the contractor's belief that it is entitled to relief. Certification of that belief that adds no "value" other that to expose the contractor to possible criminal and civil sanctions if such certification proves to be in error.

Recommendation: Repeal the certification requirement.

20. ISSUE: FAR 52.214–28 Subcontractor Cost or Pricing Data—Modifications—Sealed Bidding

Discussion: This imposes a statutory requirement: 10 USC 2306s(a) and 10 USC 2306a(b). The pertinent regulatory implementation is found at FAR 14.201–7(c). It applies to modification(s) of existing contracts.

It imposes a requirement on the part of the prime contractor to seek a certification of cost or pricing data from its subcontractor when applicable under the provisions of the Truth-in-Negotiation Act. The certification executed by the subcontractor, to the best of its knowledge and belief, states that the data submitted to the prime contractor was accurate, complete and current as of the date of agreement on price.

Recommendation: Repeal the certification requirement. Adequate provision can be made, without the certification, for appropriate adjustments to subcontract prices if, subsequent to agreement on price, errors as to the accuracy, currency or completeness of the data relied upon in negotiation are disclosed or uncovered through audit.

21. ISSUE: FAR 52.214–30 Annual Representations and Certifications—Sealed Bidding

Discussion: This is a requirement imposed by regulation, prescribed by FAR 14.201–6(u). Its purpose is to certify that representations and certifications previously submitted with respect to discrete matters of interest to the Government are still current, accurate, and complete. In addition, the provision requires submission of information as to any intervening changes—which information is concurrently certified to.

This issue in question is not the need for the subject information, but the need for such information to be certified to as a prerequisite for Government reliance. Adequate remedies under other provisions of law already abound to protect the Government's interest in the event of false statements which the government might rely upon—whether or not damaged by any such misstatements, be they intentional or not.

Recommendation: Rescind. It should suffice to merely require the update of such prior information if appropriate.

22. ISSUE: FAR 52.215–6 Type of Business Organization

Discussion: This is a requirement imposed by regulation, prescribed by FAR 15.407(c)(2). Its purpose is to advise the Government as to the nature of the entity responding to the solicitation (Request for Proposals). The offeror, by checking the appropriate box, represents that it is either a corporation, and individual, partnership, nonprofit organization, or a joint venture.

Recommendation: This information does not appear to serve any useful purpose in a solicitation and should be deleted.

23. ISSUE: FAR 52.215–11, Authorized Negotiators

Discussion: This is a requirement imposed by regulation, prescribed by FAR 15.407(c)(8). Its purpose is to have the prospective contractor (offeror) represent that the designated person or persons are authorized to negotiate the subject proposal on its behalf with the government.

Unlike the prospective contractor in dealing with the Government Contracting Officer, the government may rely upon the apparent or implied authority of the prospective contractor's representative. There is no need for the government to seek written or other assurances as to the express or actual authority of the offeror's representative.

Should the government nevertheless seek reassurance of the representative's authority, this can be accomplished readily by verbal inquiry at the commencement of negotiations.

Recommendation: Rescind.

24. ISSUE: FAR 52.215–20, Place of Performance

Discussion: This is a requirement imposed by regulation, prescribed by FAR 15.407(f). It is the equivalent of 52.214–14, but applies to solicitations for competitive or sole source proposals (Requests for Proposals) in negotiated, vice advertised, procurements.

It is a representation of present intention. The resultant information may be of importance to the government for a variety of reasons.

Recommendation: Retain.

25. ISSUE: FAR 52.215–22, Price Reduction for Defective Cost or Pricing Data

Discussion: This imposes a statutory requirement: 41 USC 254 for the civilian agencies of the Executive Branch; 10 USC 2306a, 10 USC 2306a(e)(1) for the Department of Defense. The pertinent regulatory implementation is found at FAR 15.804–8(a). It applies to the initial contract price of negotiated contracts.

The underlying issue and purpose is the same as that stated in the discussion portion of 52.214–27. If the government purpose is to provide a vehicle for contract price reopening, the clause, by bilateral agreement, serves that intended purpose; the certification, per se, is merely gratuitous. It serves no value added benefit other than to provide a tool for criminal and civil sanctions in the absence of an underlying criminal intent.

Recommendation: Repeal.

26. ISSUE: FAR 52.215–24, Subcontractor Cost or Pricing Data

Discussion: This is a statutory requirement: 10 USC 2306a and, for civilian agencies of the Executive Branch, 41 USC 254. The regulatory implementation is found at FAR 15.804–8(c). It pertains to modifications to existing contracts, and is applicable to the requirement under the Truth-in-Negotiation Act to certification, where appropriate, on the part of the subcontractor.

The discussion under 52.215–22 pertains in all respects.

Recommendation: Repeal.

27. ISSUE: FAR 52.215–25, Subcontractor Cost or Pricing Data—Modifications

Discussion: This is a statutory requirement; the same provisions of law pertain as under 52.215–24. The regulatory implementation is found at FAR 15–804(d). This provision is application to modifications to existing contracts. The certification requirement is imposed on the pertinent subcontractor.

See the discussion under 52.214–28, which was precisely the same issue except that clause pertained only to modifications to contracts awarded under sealed bid advertised procurement. This clause is used in prime contracts awarded by negotiation.

Recommendation: Repeal.

28. ISSUE: FAR 52.215–35, Annual Representations and Certifications—Negotiation

Discussion: This is a requirement imposed by regulation, prescribed by FAR 15.407(i). Its purpose and requirements mirror that in 52.211–30, which applies to sealed bid procurements whereas the instant clause pertains to those awarded through negotiation.

The discussion under 52.214–30 pertains verbatim. In point of fact, given that negotiations provide an opportunity for discussions between the parties, the need for this provision and the associated representation is even less compelling.

Recommendation: Repeal. It should suffice to merely require update of such prior information if appropriate.

29. ISSUE: FAR 52.216–2, Economic Price Adjustment—Standard Supplies

Discussion: This is a requirement imposed by regulation (FAR 16–203–4(c)). It is applicable to negotiated procurements.

The clause in issue provides for adjustment to the price of contract line items for intervening changes in labor and/or material associated with contract performance. The contractor is obliged to notify the Contracting Officer of any such changes in a timely fashion, including its proposal for appropriate adjustment to the contract price(s).

At the time of submission of its final invoice for payment, the contractor is required to certify that it has either not experienced a decrease in rates of pay for labor or unit prices for material, or it has given notice of all such decreases in compliance with the clause.

The certification requirement serves no apparent purpose other than to reassure the Contracting Officer of the contractor's compliance with this requirement—there is an audit right and access for three years following the date of final payment. Moreover, the certification is not qualified by the words, "to the best of knowledge and belief."

Recommendation: Repeal. No constructive purpose is served by this requirement other than that of intimidation.

30. ISSUE: FAR 52.216–3 Economic Price Adjustment—Semistandard Supplies

Discussion: This clause requires a certification by the contractor that the items proposed to be sold are items for which the contractor has an established price and that any differences between the price quoted to the government and the established prices are due strictly to compliance with contract specific requirements, e.g. packaging beyond standard commercial practice.

This certification (or warrant as it is referred to in the clause) is not required by statute and duplicates the compliance requirements of the clause itself.

Recommendation: ARWG strongly recommends rescission.

31. ISSUE: FAR 52.216–4 Economic Price Adjustment—Labor and Material

Discussion: This clause requires a contractor to certify with a final invoice that the contractor has either not experienced decreased labor or material rates or has given notice of all such decreases during the life of the contract.

This certification is redundant to the requirements of the clause and is not required by statute.

Recommendation: ARWG strongly rescission.

32. ISSUE: FAR 52.219–1 Small Business Concern Representation; FAR 52.219–2 Small Disadvantaged Business Concern Representation; FAR 52.219–3 Woman-Owned Small Business Representation

Discussion: These representations identify a company as a member of the respective group. While such representation is not required by law, it is the only way for the government to discern the demographics of a contractor on any given bid.

Recommendation: While ARWG encourages elimination of all non-statutory certifications and representations, this information is necessary relative to meeting socio-economic goals.

33. ISSUE: FAR 52.219–15 Notice of Participation by Organizations for the Handicapped

Discussion: This clause includes a certification by an offeror as to whether it is a public or private organization for the handicapped. Such organizations are eligible to compete as small businesses. The Javits-Wagner-O'Day Act prescribes certain commodities to be procured from the blind and other severely handicapped. This regulatory provision expands the opportunities available to these groups.

Recommendation: Retain.

34. ISSUE: FAR 52.222–15 Certification of Eligibility

Discussion: This clause requires the contractor to certify that the firm or any person having an interest in the firm is a firm or person ineligible to be awarded a contract by virtue of the Davis Bacon Act or 29 CFR 5.12(a)(1). It further reiterates the penalty for making a false statement.

This certification is not required by statute and adds no additional requirements to those otherwise imposed by law.

Recommendation: This certification should be rescinded.

35. ISSUE: 52.222–19 Walsh-Healy Public Contracts Act Representation

Discussion: This certification requires a contractor to identify whether or not it is a regular dealer in the manufacture of the supplies offered. This certification is required by law, and is one way for the government to discern the demographics of a contractor to determine whether a "front company" is proposed for contract performance.

Recommendation: Repeal this certification. The same result can be achieved without the certification by a solicitation provision that bars participation by non-regular dealers.

36. ISSUE: FAR 52.222–21 Certification of Nonsegregated Facilities

Discussion: Offeror certifies it does not and will not maintain segregated facilities, that it will obtain such certificates from its subcontractors, and retain them in its files. Requirement for certification does not appear to be statutory nor is it required by E.O. 11246, but by OFCCP regulations, 41 CFR 60–1.8. The certifications are unnecessary and non-value added since the underlying requirements will remain.

Recommendation: Remove requirement from OFCCP regulations.

37. ISSUE: FAR 52.222–22—Previous Contracts and Compliance Reports; FAR 52.222–25—Affirmative Action Compliance

Discussion: Offeror represents that it has or has not participated in a previous contract or subcontract subject to the Equal Opportunity clause of the contract or similar clauses and that it has or has not filed all required compliance reports. Certification does not appear to be required by statue or E.O. 11246, but by OFCCP regulations, 41 CFR 60–1.7(b). Certification are unnecessary and non-value added.

Recommendation: Remove requirements from OFCCP regulations.

38. ISSUE: FAR 52.222–43 Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiple year and Option Contracts)

Discussion: This clause includes a "warrant" that the contractor has not included any allowance for contingencies to cover increased costs in its prices for which adjustment is provided under the clause.

While this clause clearly implements law, the certification contained in the clause is beyond the scope of statutory requirements.

Recommendation: This certification should be rescinded.

39. ISSUE: FAR 52.223–1 Clean Air and Water Certification

Discussion: This certification is required to indicate whether a contractor is listed on the Environmental Protection Agency (EPA) list of Violating Facilities.

This certification is not required by statute. It shifts the burden of determination of compliance from the government to the contractor and does not require any action in addition to compliance with the standards of the Clean Air and Water Act.

Recommendation: This certification requirement should be rescinded.

40. ISSUE: FAR 52.223–3 Hazardous Material Identification and Material Safety Data (including Alternate 1)

Discussion: This clause requires a contractor to list all hazardous material to be used under contract performance then certify that the list is complete, including updates to the list during contract performance.

The requirements of the clause clearly implement statutory requirements for handling hazardous materials, but the certification is not required by statute, and adds no additional value to the clause requirements.

Recommendation: This certification requirement should be rescinded.

41. ISSUE: FAR 52.223–4 Recovered Materials Certification

Discussion: This certification obligates the contractor to use recovered materials in accordance with the Federal Acquisition Regulation. This certification is required by statute (42 USC 6962) but otherwise duplicates the requirement to perform in accordance with other contractual obligations.

Recommendation: This statutory requirement should be repealed.

42. ISSUE: FAR 52.223–5 Certification Regarding a Drug-Free Workplace

Discussion: Through this clause a contractor certifies that within 30 days after contract award it will essentially comply with the requirements of 52.223–6, Drug-Free Workplace, subject to prosecution under 18 USC 1001.

This certification is required by statute but adds no additional compliance requirements in addition to those imposed under the Drug-Free Workplace clause and is therefore duplicative.

HR 1670 eliminates this certification while maintaining the requirements of the clause.

Recommendation: ARWG strongly supports repeal of this certification.

43. ISSUE: FAR 52.223–7 Notice of Radioactive Materials

Discussion: The clause requires the contractor to agree to notify the contracting officer within a stipulated number of days prior to the delivery of any radioactive materials. The contracting officer may waive the notice provisions only after receiving a certification from the contractor that prior notification procedures are still accurate. By its terms, the clause must be included in all subcontracts for radioactive material meeting the threshold of special material included in the clause. The clause is not required by statute.

Recommendation: While the clause is not objectionable, the requirement for the certification in order to obtain a waiver is unnecessary and should be rescinded.

44. ISSUE: FAR 52.225–1 Buy American Certificate

Discussion: This solicitation clause requires offerors to certify that, except to the extent listed in the clause, all products used in the performance of the contract are of "domestic origin" as that term is defined. The clause implements the Buy American Act, which applies to supply contracts exceeding the micro-purchase threshold and contracts for services that involve providing supplies when the supply portion exceeds the micro-purchase threshold.

Recommendation: The Buy American Act certification should exempt commercial items from coverage since it may be impossible to know, and thus certify to, the country of origin on such items sold to the Federal Government.

45. ISSUE: FAR 52.225–6 Balance of Payments Program Certification

Discussion: This clause is to be used in solicitations for supplies or services for use outside the United States, unless otherwise exempt. The clause implements law.

Recommendation: The clause should be limited to contracts in excess of the simplified acquisition threshold, and to contracts for other than commercial items.

46. ISSUE: FAR 52.225–8—Buy American Act—Trade agreements Act—Balance of payments Program Certificate; FAR 52.225–20—Buy American Act—North American Free Trade Agreement Implementation Act—Balance of Payments Program Certificate

Discussion: Offeror certifies that end products, except as specified, are domestic end products; offeror also must specify supplies which are NAFTA country end products or Caribbean Basin country end products. There is no statutory basis for certification.

Recommendation: Rescind the certification. Contractor compliance with Buy American does not require certification.

47. ISSUE: FAR 52.225–10, Duty Free Entry

Discussion: This clause is used in solicitations and contracts over $100,000 that provide for, or anticipate furnishing, supplies to be imported which qualify for "duty-free entry" and to not include in the contract price any amount for any duty associated with such supplies. The clause implements the Tariff Laws of the United States, and is a mandatory flowdown to all subcontracts where imported items accorded "duty-free" entry are provided.

Recommendation: The clause serves its designated purpose, although for certain commercial items it may be impossible to know at the time of import of the item whether the U.S. Government will be a recipient of such supplies, or at the time of contracting with the U.S. Government whether supplies have been imported.

48. ISSUE: FAR 52.225–16 Buy American Act—Supplies Under European Community Agreement Certificate

Discussion: The Buy American Act requires the U.S. Government to give preference to domestic end products. However, the Memorandum of Understanding between the United States and the European Community on Government Procurement provides that offers of EC end products will be evaluated without regard to the Buy American Act. The solicitation clause, and the offeror's certification state that the product offered, unless otherwise disclosed, are "EC domestic end products" that qualify under the Buy American Act exemption.

Recommendation: Retain the present clause.

49. ISSUE: PAR 52.227–15 Representation of Limited Rights Data and Restricted Computer Software

Discussion: As one element of a number of solicitation and contract clauses relating to the coverage of rights in technical data applicable to the civilian agencies only, this solicitation clause requires the offeror to "represent" to the government whether data which is required to be delivered under the contract qualifies as "limited rights" or "restricted computer software", as those terms are defined in the policy statement and other contract clauses. The civilian agency rule has been in effect since 1987.

The clause implements provisions from the Office of Federal Procurement Policy Act. The Defense Department has a separate set of regulations on rights in data, and a different "representation" clause because of unique statutory coverage.

Recommendation: Until a final rule is adopted on changes to the DFARS clause, retain the present FAR clause. Statutory changes will be required to harmonize the FAR and DFARS provisions.

50. ISSUE: FAR 52.227–21 Technical Data Certification, Revision, and Withholding of Payment—Major Systems

Discussion: As one element of a number of solicitation and contract clauses relating to the coverage of rights in technical data applicable to the civilian agencies only, this contract clause requires the contractor to certify that, to the best of its knowledge and belief, all technical data delivered under the contract are "complete, accurate and comply with the requirements of the contract concerning such technical data." The clause allows the contracting officer to withhold certain amounts due the contractor if in the contracting officer's opinion the contractor failed to make timely delivery of data, update data as required, or provide the certification required under the clause.

Recommendation: Until a final rule is adopted on changes to the DFARS clause, retain the present FAR clause. No statutory changes will be required to harmonize the FAR and DFARS clauses.

51. ISSUE: FAR 52.228–5 Insurance—Work on a Government Installation

Discussion: Under the clause, the contractor shall provide and maintain the types and amounts of insurance as provided for in the contract. Further, prior to commencing work under the contract, the contractor shall certify to the contracting officer in writing that the required insurance has been obtained.

The clause has a mandatory flowdown to subcontractors that require work on a government installation. There is no statute requiring such action.

Recommendation: Rescind the certification. The contractor can demonstrate to the contracting officer that the insurance required under the contract has been obtained, without the added burden of certifying.

52. ISSUE: FAR 52.228–8 Liability and Insurance—Leased Motor Vehicles

Discussion: When the Government leases motor vehicles, this clause establishes the government's and the contractor's liability and insurance requirements for loss or damage resulting from the government's use. The clause specifies a minimum amount of liability coverage which the contractor must maintain, and further requires that, before commencing work on the contract, the contractor must certify to the contracting officer that the required insurance has been obtained.

There is no flow down of the clause required. There is no statute which requires the certification.

Recommendation: Rescind the certification.

53. ISSUE: FAR 52.228–9 Cargo Insurance

Discussion: This clause is to be used in solicitations and contracts for transportation and related services contracts. The clause requires the contractor to provide and maintain insurance in the amount specified in the contract, and requires the contractor to provide "evidence of acceptable cargo insurance" before commencing operations under the contract. Further, the contractor must provide a "complete duplicate certified copy" of the cargo liability insurance to the contractor officer before beginning performance.

Recommendation: Delete the requirement that "complete duplicate certified copy" of the insurance be provided to the agency prior to the commencement of work

under the contract. It is adequate to require, by contract, that the contractor have insurance.

54. ISSUE: FAR 52.229–2 North Carolina State and Local Sales and Use Tax

Discussion: This clause is to be used in solicitations and contracts for construction to be performed in North Carolina. Where construction supplies are purchased, the contractor shall provide the contracting officer with a certified statement setting forth the cost of the materials and the amount of North Carolina state and local sales and use taxes paid, so as to support the request for a refund of such taxes. The clause implements a federal court decision only.

Recommendation: Rescind the certification. This added burden is not necessary.

55. ISSUE: FAR 52.230–1 Cost Accounting Standards Notices and Certification

Discussion: This clause is included in contracts and requires the contractor, under certain circumstances, to comply with the cost accounting standards and the disclosure requirements. The clause includes four separate certifications for which contractors can check off, as appropriate. In addition, the clause has a separate certification box to check off if the contractor claims an exemption from coverage. The clause has both statutory and non-statutory elements included.

Recommendation: Retain the current provision.

56. ISSUE: FAR 52.232–12, Advance Payments and Alternates I–V

Discussion: As required by statute, advance payments will be made under the contract upon submission of properly certified invoices. The contractor must also represent and warranty his financial statements, litigation status, contingent liabilities, liens, and other financial information covering each invoice for advance payments.

Alternate I waives the countersignature requirement by the contracting officer on special bank account transactions for qualifying contractors; Alternate II is for use with cost reimbursement contracts; Alternate III provides language for more rapid liquidation; Alternate IV provides for no interest to be paid by the prime contractor; Alternate V provides language for providing advance payments without a special bank account.

Recommendation: Repeal. Once a contractor is approved for advance payments, it should not be necessary to certify each invoice.

57. ISSUE: FAR 52.232–16, Progress Payments and Alternates I and II.

Discussion: The clause implements both statutory and regulatory requirements and requires a contractor to promptly furnish reports and certificates and other information reasonably requested by the contracting officer for administration of the clause.

Alternate I provides for different progress payment and liquidation rates for contracts with small businesses. Alternate II provides different rates for letter contracts.

While it seems reasonable for the contractor to submit periodic reports, there is no value added by requiring certification.

Recommendation: Rescind the certification.

58. ISSUE: FAR 52.233–1, Disputes and Alternate I.

Discussion: The clause implements a statute and requires that an offeror certify that a claim over $50,000 is made in good faith, the supporting data are accurate and complete, the amount reflects the adjustment the contractor thinks the government is liable for, and the person certifying the claim is authorized to do so. Alternate I provides language requiring the contractor to continue performance pending resolution of the claim.

The Congress enacted this requirement to combat frivolous, bogus, overstated and unauthorized claims.

Recommendation: Retain.

59. ISSUE: FAR 52.245–2, Government Property (Fixed-Price Contracts) Alternates I and II.

Discussion: As required by statute the clause requires the Contractor to represent that the contract price does not include any amounts for repair or replacement (of property) for which the Government is responsible. Alternate I provides language for negotiated fixed price contracts in which the Contractor represents that no amounts for insurance or a reserve for loss or damage to government property is included in the price. Alternate II provides appropriate language for contracts with nonprofit and educational institutions.

The clause implements the government's long standing policy on self insurance.

Recommendation: Rescind. Review of contractor's property system should be adequate to ensure compliance with government's policy.

60. ISSUE: FAR 52.246–15, Certificate of Conformance.

Discussion: This nonstatutory clause permits a contractor to ship supplies without government source inspection by execution of a certificate that the supplies shipped conform to contract requirements.

This is a privilege extended to certain contractors. The certificate is far less burdensome than the alternative—government inspection.

Recommendation: Retain.

61. ISSUE: FAR 52. 246–20, Warranty of Services

Discussion: Nonstatutory, requires that the contractor warrant that the services performed, at the time of acceptance, are free from defects in materials or workmanship.

Contractually implements the concept of warranty of services. Concept in wide use commercially. Not unreasonably burdensome.

Recommendation: Retain.

62. iSSUE: FAR 52. 246–21, Warranty of Construction.

Discussion: Basically the same as above, but for construction contracts. Adds free from defects of equipment and design.

Recommendation: Retain.

63. ISSUE: FAR 52.247–2, Permits, Authorities, or Franchises

Discussion: Used in transportation or transportation related services contracts when regulated transportation is involved, the clause requires the offeror to certify that it does or does not hold authorization from the Interstate Commerce Commission or other cognizant regulatory body.

The certification implements the underlying statute. Absent repeal of the statute, the chances of rescinding the certification requirements appear slim.

Recommendation: Retain.

64. ISSUE: FAR 52.247–54, Diversion of Shipment Under F.O.B. Destination Contracts

Discussion: Required by statute, the Contractor must certify that shipments to the original destination were made or would have been made by the contractor's owned or leased trucks.

Recommendation: Repeal. Like many-other certification requirements, the reason for this is no longer apparent and should not be continued.

65. ISSUE: FAR 52.247–63, Preference for U.S. Flag Air Carriers

Discussion: Required by statute, the clause requires that contractors to execute a "Certificate of Unavailability of U.S. Flag Air Carriers" for International travel and flow the clause down to each subcontract or purchase.

A protective special interest cert that adds more politico-economic clutter to government contracts; however, the chances of repeal are slim.

Recommendation: Retain.

66. ISSUE: FAR 52.249–2(c), Termination for Convenience of the Government (Fixed-Price).

Discussion: After expiration of the plant clearance period prescribed in Part 45, this clause permits the Contractor to submit a list to the Contracting Officer, certified as to quantity and quality, of termination inventory not previously disposed of for removal by the government or enter into a storage agreement.

Administratively imposed, this requirement seems reasonable for disposal of termination inventory in infrequent termination actions.

Recommendation: Retain.

67. ISSUE: FAR 52.249–2, Termination for Convenience of the Government—(Alternate I, II, III).

Discussion: Same as above, but for (I) construction contracts, (II) for contracts with a U.S. government agency or state or local governments, (III), for construction contracts with U.S. Government agencies, state or local governments.

Recommendation: Retain.

68. ISSUE: FAR 52.249–6, Termination (Cost Reimbursement).

Discussion: Permits the contractor to submit a certified list of termination inventory as in the above clauses. Also requires that the contractor submit a final termination settlement proposal in the form and with the certification prescribed by the Contracting Officer.

Recommendation: Retain.

69. ISSUE: FAR 52.249–6, Termination (Cost Reimbursement) (Alternates I Thru V).

Discussion: Same as above, but for (I) construction contracts, (II) for contracts with a U.S. government agency or state or local governments, (III), for construction contracts with U.S. Government agencies, state or local governments, (IV) for time-and-material or labor hour contracts, and (V) for time and material or labor hour contracts with an agency of the U.S. Government, state or local government.

Recommendation: Retain.

PREPARED STATEMENT OF RICHARD J. LOMBARDI, PRESIDENT, AT&T GOVERNMENT MARKETS

Chairman Clinger and Chairman Spence, AT&T appreciates the opportunity to submit testimony for the record on H.R. 1670, the "Federal Acquisition Reform Act of 1995." AT&T commends your efforts to refine and expand upon the important legislative imperatives embodied in the Federal Acquisition Streamlining Act of 1994 (FASA) and to otherwise improve the Federal acquisition system, and we look forward to working with you as this bill makes its way through the legislative process.

Commercial Marketplace—Like Approach

In particular, we appreciate your Committees' recognition that burdensome, government-unique requirements, such as those contained in the Truth in Negotiations Act (TINA) and the Cost Accounting Standards (CAS), really do not have any parallels in the commercial marketplace. Likewise, we really do not believe such requirements serve a constructive purpose in the government marketplace for commercial goods and services. Indeed, they represent significant barriers to the participation of commercial firms in federal procurements, and otherwise are inappropriate when purchasing commercial products.

Exempting commercial item purchases from the TINA requirement for the submission of cost and pricing data and limiting the information required to be submitted for determining price reasonableness is a marked improvement to the current process. Indeed this reform will allow the government to derive the benefits of competition in its acquisition activities rather than overlaying an audit driven process on the market-driven process. As a matter of sound public policy, we also support your inclusion of language codifying the government's long-standing policy of reliance on the private sector for needed goods and services. When combined with the new emphasis on market research enacted into law last year in the Federal Acquisition Streamlining Act (FASA), these changes represent an excellent opportunity for meaningful reform.

Cost Effective Bid Protest Forum

We support the thrust of your efforts to consolidate the current bid protest fora into a single forum in order to maximize the effectiveness and efficiencies of the protest system and reduce administrative costs. We especially note the significant efforts you made to try to retain the essential authorities and procedures of the current system to assure meaningful redress if the public interest has been abused.

Given that a new, independent forum is being established, however, and given the fact that there are those who do not wish to see a meaningful protest system survive, it is important that you clarify explicitly that the bill in no way intends to limit or reduce existing protest authority. David Packard, himself associated with the historic effort to reform the Federal acquisition system, described the protest process established under the Competition in Contracting Act (CICA) of 1984 as a critical "check and balance" in the procurement system. We believe that check and balance must be maintained, and its vitality is essential to safeguarding the public interest.

In addition, your bill provides the new United States Board of Contract Appeals (USBCA) authority to dismiss frivolous protests. We think this provision is valuable because it assures that our system will not be bogged down with useless cases that serve only to delay government business. We are concerned, however, that the bill does not pick up the specific language contained in FASA which addressed the decision of the Federal Circuit Court of Appeals which had concluded that bad faith actions in the course of a protest were not the same as frivolous actions, and thus, could not be dismissed by the General Services Administration Board of Contract Appeals (GSBCA). FASA authorized the GSBCA to dismiss bad faith protests and sanction those who abuse the process. H.R. 1670's provision, and your obvious intent, would be strengthened by explicitly including the authority to dismiss bad faith protests among the express authorities of the USBCA. In addition, such language would assist that Board in managing its docket and otherwise avoid unnecessary delays in the procurement process.

Finally, with respect to dispute resolution, AT&T supports the intent of provisions seeking to utilize Alternate Dispute Resolution techniques. To the extent the government and vendors can collaborate on matters and come to expeditious, informal conclusions of disputes, it only improves the process.

Expenditures of Tax Dollars for the Government

Your legislation provides that the new protest process correctly focus, in part, on the activity of contracting officers. The new protest provisions, however, are silent

with respect to those who stand in the shoes of the government in acquisition activities funded by tax dollars.

You will recall, Mr. Chairman, that while negotiating FASA, a provision to cover the contract award decisions of those who act for the federal government was deleted. At that time, however, no one was considering the reductions in federal operations or privatization being considered today.

With those reductions, some in government may come to rely on the decisions of outside firms to perform heretofore government operations. Whether such reliance is sound policy for the government is a separate question. What can be addressed in your bill is the assurance of safeguards and accountability for the procurement actions made on behalf of the government by third parties. These off-loaded procurements already total billions of dollars today, and could become much larger in the future.

Under these circumstances, with precious taxpayer dollars at play, we believe it is important that Congress revisit, and ultimately affirm, that the decisions of those acting for the government and expending government dollars must, of necessity, be subject to the same accountability standards applicable to government contracting officers. To assure this oversight, and protect the public interest, the inclusion of explicit language on this matter is very important.

Appropriate Use of Simplified Processes

Chairman Clinger and Chairman Spence, although we applaud the thrust of provisions in H.R. 1670 that permit the acquisition of commercial items under simplified procedures without regard to the dollar value of the procurement, we have concerns that they may provide incentives for officials to engage in network-type or systems integration acquisitions under the guise of commercial buys. Indeed, on an item-by-item basis, the commercial items so purchased would probably be obtained less favorably than in the context of an appropriately fashioned competitive procurement. Thus, we believe these provisions can be strengthened by clarifying that they seek only to facilitate the acquisition of commercial items and must not serve as a substitute for, or shield to mask integration contracts, networking contracts, and/or other non-commercial acquisitions.

Real Competition

Of great significance are the sections of this bill regarding the proposed principles for procurement competition. Under the terms of the bill, other than competitive procedures may be used only when the use of competitive procedures is not "feasible or appropriate." In addition, the bill proposes a new principle, Maximum Practicable Competition, ("a maximum number of responsible or verified sources (consistent with the particular Government requirement) are permitted to submit sealed bids or competitive proposals on the procurement"). This new principle sounds like it may encompass the principles of full and open competition, but frankly, it is not clear.

Although the bill seeks to have many issues addressed in regulation, historical experience demonstrates risk in complete reliance on the regulatory process to interpret the intent of Congress in procurement law. Such experience indicates that it would be important and helpful to the entire community to have these principles clarified in the bill itself, if for no other reasons than to avoid litigation over their meaning, and to otherwise ensure that the Executive Branch does not unilaterally legislate through regulation.

With respect to the competition principle, under the current system, full and open competition should be obtained among firms that are responsible and have a reasonable chance of obtaining an award. If government agencies currently are not actually eliminating firms not suitable for award, the problem you are seeking to address may be related to a flaw in the procurement culture, which will not be changed by legislation.

Thus, if the government has proven unwilling or incapable of weeding out vendors not suitable or responsible for an acquisition, then we understand why it would be necessary to enhance the acquisition phase for objective verification of vendor responsibility. But, after such verification is accomplished, it is not clear why the principle for the ensuing competition should change from the "full and open" principle which has served the nation so well for the past decade.

Without clarification, the "maximum practicable" principle proposed in H.R. 1670 might be viewed by some as authority to limit the participation of otherwise qualified vendors on a subjective basis, removing competitive alternatives from the hands of government end-users and objective business opportunity from legitimate vendors. AT&T, a company that has experienced efforts by agencies to exclude us from competition for reasons not associated with an objective determination, or law or

regulation, this threat is real, and for this reason, we believe such activity should not be legalized inadvertently.

Accordingly, we support your objective of enhancing the objective responsibility determination phase of federal procurement, but we also recommend that the market-based full and open competition principle be carefully preserved. The Packard Commission strongly urged that competition in federal procurement be strengthened and increased, and this position is one we have embraced historically.

In closing, I reiterate that we applaud your efforts to seek to streamline our government. We understand that such an effort is not taken without risk. Indeed, many may raise legitimate concerns regarding the structures and oversight mechanisms in place, and the proper transition of safeguards to a new environment.

For that reason, the Committees may wish to consider allowing more time to air their goals for this legislation. This approach would not be unprecedented; indeed FASA, for the most part, took much effort over time in the Legislative Branch alone. For our part, we are concerned that all the potential consequences of the bill may not yet be appreciated in the short time frame under which review and dialogue has taken place.

Chairman Clinger and Chairman Spence, we support your work to improve the acquisition process, and we stand ready to assist you in your efforts. Thank you for the opportunity to present our views today.

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS,
May 22, 1995,
CODSIA Case 13–94.28.

GENERAL SERVICES ADMINISTRATION,
FAR Secretariat (VRS),
18th & F Streets, NW,
Room 4037,
Washington, DC.

Ref: FAR 94–791, Subcontracts for Commercial Items

DEAR FAR COUNCIL: The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to comment on the proposed rule published in the Federal Register on March 22, 1995, as revised on April 4, 1995. Formed in 1964 by industry associations with common interests in the defense and space fields, CODSIA is currently composed of nine associations representing over 4,000 member firms across the nation. Participation in CODSIA projects is strictly voluntary; a decision by any member association to abstain from participating in a particular activity is not necessarily an indication of dissent.

The proposed regulation issued on March 22 supplements the regulation on commercial items published on March 1 (FAR Case 94–790) by providing the list of laws determined to be inapplicable to subcontracts for the acquisition of commercial items in accordance with section 8003(a) of the Federal Acquisition Streamlining Act (FASA) and a list of clauses applicable to subcontracts for the acquisition of commercial items. The revision published on April 4 contains provisions on the examination of records clauses applicable to the acquisition of commercial items.

As indicated in the comments previously submitted by CODSIA on FAR Case 94–790, we believe the proposed regulation for the most part faithfully implements the policies and goals of FASA. The comprehensiveness of the list of statutes waived for subcontractors is critical to the success of the effort to enable the Government to procure commercial items, as is the list of clauses to be flowed down to subcontractors, and we commend the drafting team for their efforts. The comments CODSIA submitted on FAR Case 94–790 addressed some of the areas where we believe improvement's could be made, and these comments supplement our earlier letter.

Section 12.403, Applicability of Certain Laws to Subcontracts

We believe this list represents a reasonable initial list of statutes inapplicable to subcontracts for commercial items. Obviously this list may never be exhaustive, and the fact that a statute does not appear on the list does not necessarily indicate that it is applicable to commercial subcontracts. For example, the Buy American Act and Trade Agreements Act are not listed, as explained in the preamble to FAR Case 94–791, but the clauses are not prescribed for flowdown under 52.244–XX.

Nevertheless, for clarity we believe the following statutes should be added to the list in 12.403:

10 USC 2533, Limitation on Use of Funds; 41 USC 10a–10d, Buy American Act; 19 USC 2512(a), Trade Agreements Act

If necessary, guidance should be issued on whether the cost and origin of subcontractor components need be considered for commercial items under the prime contract clauses, and the statutes should be added to the list.

19 USC 1202, 1309(a), 2701 et seq., Duty Free Entry; 31 USC 1352(b), Limitation on Use of Appropriated Funds (Byrd Amendment)

This statute should be added to the list if there is any doubt as to its applicability to commercial items. As noted in our previous comments, we believe the statute was never intended to apply to commercial practices, as did the Section 800 Panel. The intent of the Byrd Amendment was to ensure that Federal funds were not utilized to influence the award of Federal contracts, grants, etc. In the commercial world, this would never occur. Its reporting and accounting requirements are completely inconsistent with commercial practices and are unacceptable to commercial suppliers.

41 USC 351–358, Service Contract Act

This statute should be added to the list of laws to clarify that it is not applicable to subcontracts. On numerous occasions, services such as maintenance or repair are provided to support commercial items that have been delivered at an earlier date. The Service Contract Act imposes burdensome reporting requirements which are unacceptable to commercial subcontractors.

52.212–5(d), Comptroller General Examination of Records

Although we recognize that FASA did not eliminate the requirement for Comptroller General access to records, we believe that this provision will continue to act as a barrier to commercial suppliers entering the Government marketplace.

As one of our member firms comments:

> We have ample evidence that the current regulations granting the Government record examination rights of firms that submit SF 1412 exemption requests limits our access to a broad supplier base. Firms continue to tell us they will refuse the business (Government-funded subcontracts) if it makes them liable to any additional Government intrusion.

One possibility that might ameliorate this problem would be to allow contractors to define at the outset of the contract what records will be considered "directly pertinent records," thus removing the uncertainty as to whether a contractor will be able to protect competitive-sensitive and proprietary data. If this is not possible, further legislative relief in this area may be necessary.

52.212–5(e) and 52.244–XX(d), Subcontractor Flowdown

As noted in our earlier comments, there is a discrepancy between 52.212–5(e), which states that only three clauses are required to be flowed down, and 52.244–XX(d), which includes a fourth clause, 52.203–12 (the Byrd Amendment). We assume that the inclusion of 52.203–12 in 52.244–XX(d) was an error. As discussed above, this provision is incompatible with commercial practices and would create a barrier for many commercial suppliers.

The remaining three clauses impose affirmative action and reporting requirements with respect to the employment of applicants without regard to race, color, religion, sex, national origin, handicap or status as a Vietnam veteran. Most companies already comply with other laws that prohibit discrimination against these classes of people, and those requirements should be sufficient. We suggest the FAR Council therefore reconsider whether it is necessary to require the prime contractor to flow these clauses down.

CODSIA appreciates the opportunity to comment on the proposed rule. If you have any questions about our comments or need additional information, please contact Ms. Ella Schiralli of the Electronic Industries Association at (703) 907–7585.

Sincerely,

DON FUQUA,
President, Aerospace Industries Association.
LAWRENCE F. SKIBBIE,
President, American Defense Preparedness Association.
JOHN F. MANCINI,
Chief Operating Officer, American Electronics Association.
GARY D. ENGEBRETSON,
President, Contract Services Association.
DAN C. HEINEMEIER,
Vice President, Electronic Industries Association.
KENNETH MCLENNAN,
President, Manufacturers Alliance for Productivity and Innovation.
JAMES R. HOGG,
President, National Security Industrial Association.
PENNY L. EASTMAN,
President, Shipbuilders Council of America.

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS,
May 22, 1995,
CODSIA Case 13–94.29.

Mr. CRAIG HODGE,
Protests/Disputes Team Leader,
General Services Administration,
FAR Secretariat (VRS),
18th & F Streets, NW,
Room 4037,
Washington, DC.

REF: FAR 94–731, Ratification and Protest Costs

DEAR MR. HODGE: CODSIA is pleased to comment on the above FAR case as published in the Federal Register on March 23, 1995, at pages 15450–52.

CODSIA was formed in 1964 by industry associations having common interests in the defense and space fields. The government encouraged formation of this organization as a vehicle for obtaining broad industry reactions to new or revised procurement regulations, policies and procedures. In our 31st year, CODSIA is comprised of nine associations, representing some 4,000 large and small member firms across the nation.

In general, we believe that the proposed changes to FAR Part 33 properly carry out the relevant provisions of FASA dealing with procurement protests. Our concern is with the proposed coverage of the recovery of protest costs from an awardee, a matter not covered by FASA or any other statute.

Thus proposed, FAR 33.1–4(h) concerning GAO protests would add a new paragraph (7) as follows:

> If the Government pays costs, as provided in paragraph (h)(1) of this section, where a post award protest is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification, the Government may require the awardee to reimburse the Government the amount of such costs. In addition to any other remedy available, and pursuant to the requirements of 48 CFR (FAR) part 32, subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.

Proposed FAR 33.105(g)(5) would add a corresponding provision for protests to the GSBCA. Finally, this remedy would be covered by conforming changes to FAR 32.602 and .603 and by the addition of a mandatory paragraph (f) to FAR Clause 52.233–3, Protest After Award, included in solicitations.

In support of this proposal, the commentary states:

> Sections 1016, 1403 and 1435 of the Act provide that agencies may be required to pay protest and offer preparation costs to protests under certain

circumstances. Often as the result of discovery during a protest, misrepresentations may be detected that could not have been reasonably known to the agency's evaluators. A protest may be sustained where the award has been induced by a material misrepresentation by the awardee. Such situations often involve proposed "key personnel."

The agency is without effective remedy in such cases. Theoretically, the agency could ask the Department of Justice to file a lawsuit against the offeror making the misrepresentations. However, due to the heavy workload of the Justice attorneys, this is not a practical alternative. The proposed FAR change will not adversely affect any substantive right of an offeror. Under the proposed language, the Government remedy is to offset such costs on the same or an unrelated contract. If the offeror believes that the offset is not justified, it may appeal the action to the agency, or under the Contract Disputes Act to either a Board of Contract Appeals or the Court of Federal Claims.

We agree that where a protest decision includes a determination that an award has been induced by a knowing and material misrepresentation, the Government's remedies should include the recovery from the awardee of the costs it has paid to the protester under the above-cited sections of FASA. However, we believe that this further remedy should be created by appropriate modifications to the above-cited FASA sections, and not by changes to the FAR without statutory authorization as we believe is the case here. Additionally, if such a provision is included in reform legislation, the Government's remedy should be triggered only by an express finding that a knowing, intentional and material misrepresentation took place. Very serious due process issues arise under this offset process proposed in the FAR language and commentary, including whether these offsets are penalties, punishments or a "taking." These questions should be resolved by Congress with full deliberations.

We also question that "the agency is without effective remedy in such cases." Contracts so awarded may be rescinded or voided for knowing and material misrepresentations without regard to how the misrepresentation is discovered. Such misconduct may also be a cause for debarment and suspension under the FAR. Finally, the Government would have the administrative remedies for false claims and statements provided by Chapter 38 of 31 U.S. Code.

Accordingly, we recommend that the proposal for the recovery of protest costs from awards be withdrawn. In this regard, there is neither statutory authority for the provision, nor is there a need for statutory authority because the Government already has fully adequate statutory and administrative remedies to address knowing and material misrepresentation issues. In short, the proposal is inconsistent with the concept of streamlining that is incorporated in FASA because it is redundant and duplicative.

Sincerely,

DON FUQUA,
President, Aerospace Industries Association.

LAWRENCE F. SKIBBIE,
President, American Defense Preparedness Association.

GARY D. ENGEBRETSON,
President, Contract Services Association.

DAN C. HEINEMEIER,
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KENNETH MCLENNAN,
President, Manufacturers Alliance for Productivity and Innovation.

JAMES R. HOGG,
President, National Security Industrial Association.

BERT M. CONCKLIN,
President, Professional Services Council.

PENNY L. EASTMAN,
President, Shipbuilders Council of America.

PREPARED STATEMENT OF INFORMATION TECHNOLOGY INDUSTRY COUNCIL

The Information Technology Industry Council ("ITI") appreciates the opportunity to submit this statement for the record of the May 25, 1995, joint hearing of the House Government Reform & Oversight and National Security Committees, regard-

ing H.R. 1670, the Federal Acquisition Reform Act of 1995. We commend the committees for conducting hearings on this bold legislative initiative.

ITI represents the leading U.S. providers of information technology products and services. Its members had worldwide revenues of $277 billion in 1994. They directly employ more that 1 million people in the United States, and contract with thousands of small businesses located in every region of the nation to distribute their commercial products and services to the federal government.

Due to the short time period between the introduction of H.R. 1670 and the hearing, ITI was not able to complete a thorough review of every section of this important legislation. Consequently, we are unable at this time to provide comments on every provision of the bill. Nevertheless, we will offer specific comments on those issues for which we have already established a position, as well as more general comments on other key sections of the bill.

As an industry association comprised solely of commercial manufacturers and suppliers, ITI has been a long-time supporter of streamlining the federal procurement process, and has consistently advocated the adoption of market-tested and proven commercial business practices to accomplish this worthwhile objective. Accordingly, we were an enthusiastic supporter of the Federal Acquisition Streamlining Act of 1994 ("FASA"), passed by these committees and signed into law by President Clinton last October. Although that legislation established the statutory impetus for making important improvements in the way the federal government interacts with commercial business, a number of issues of critical importance to the commercial information technology industry were either not included in the legislation, were not fully addressed, or were improperly interpreted in the proposed regulatory implementation. In our view, H.R. 1670 effectively brings to closure a number of those issues.

TRUTH IN NEGOTIATIONS ACT; POST AWARD AUDITS

In our February 28, 1995, testimony before the House Government Reform Subcommittee on Government Management, Information and Technology, ITI highlighted two significant impediments to full commercial industry participation in the federal marketplace: the data submission requirements of TINA, the Truth in Negotiations Act (10 U.S.C. 2306(a)); and the post-award audit authority created by Sec. 1204 of FASA. We urged the subcommittee to amend H.R. 1388, the Federal Acquisition Improvement Act of 1995, to provide a more concise and complete commercial item exemption from TINA, and to repeal the post-award audit authority. We are extremely pleased that H.R. 1670 accommodates both requests.

By providing a more definitive commercial item exemption from the cost and pricing data submission requirements of TINA, and the maze of sales "tests" that commercial suppliers must negotiate to "prove" that a product is truly commercial, Sec. 201 of this bill effectively removes what has been the single greatest impediment to federal acquisition of commercial products and services. In so doing, H.R. 1670 restores the original intent of Congress in passing TINA, namely, to encourage government reliance on the highly-competitive commercial marketplace to ensure that the prices it pays for commercial products and services are "fair and reasonable."

The elimination of the post-award audit authority created by FASA will provide critical relief from a burdensome government-unique requirement that runs contrary to common business practice in the commercial marketplace. As we pointed out in our previous testimony, existing law already provides the federal government with the authority to evaluate sales and pricing data for sufficiency and accuracy before the contract is signed. We applaud the bill's sponsors for acknowledging this fact and removing this onerous requirement.

ELIMINATION OF CERTIFICATION REQUIREMENTS

ITI also applauds the inclusion of Sec. 302, "Elimination of Certain Certification Requirements." This provision provides further relief from government-unique requirements that add to the administrative burden and cost of doing business with the federal government. However, we urge the committees to expand the limited reach of Sec. 302 and exempt commercial item procurements from all government-unique certifications and related requirements—both statutory and regulatory—that have no corollary in commercial practice. The fundamental policy should be, if a federal law does not apply to private transactions in the commercial marketplace, then it should also not apply when the government enters that same marketplace as a buyer of commercial goods and services. In other words, commercial manufacturers should be able to sell to the government under the same terms and conditions as they do to other commercial customers. Although FASA did, and H.R. 1670 does, provide some relief from government-unique requirements, they still do not go far

enough. We urge the committees to include language that clearly exempts commercial items from such requirements, and would be happy to work with you to identify additional laws and regulations for inclusion under this section.

Further, we recommend adding language to Sec. 302 that would require the Administrator for Federal Procurement Policy to publish in the Federal Register notice of all agency requests to retain non-statutory certification requirements, and to provide for a public comment period of not less than sixty (60) days prior to rendering a decision on such requests. The resulting disclosure will enhance the opportunity of public dialog on issues that may have a far greater impact than initially assumed.

OTHER PROVISIONS OF INTEREST

Regarding Sec. 101, Improvements in Competition Requirements, ITI supports in concept the need for improving the competition standard, to enable the government to better tailor the level of competition to the nature and requirements of procurements. However, we will be interested in learning how the committees intend to define "verified sources" (Sec. 102(a)), and in obtaining greater detail on how a supplier would become "verified," how it could lose this status, and how or whether a supplier could regain this status once it is lost. We trust these issues will be addressed fully by the committees prior to reporting out this legislation.

ITI also agrees that the current bid protest system can and should be improved, to, among other things, reduce the amount of time it takes federal agencies to acquire the products and services they need to accomplish their missions, and to reduce the cost of protests to the government and contractors. We look forward to reviewing in greater detail Title IV of this legislation, and will be happy to provide you with our comments at a later date.

CONCLUSION

As commercial information technology manufacturers and suppliers, ITI firmly believes that adoption of the commercial item provisions of H.R. 1670 will significantly improve the federal procurement system, resulting in greater government access to state-of-the-art commercial information technology, and a dramatic expansion of commercial participation in the federal marketplace. Thank you for the opportunity to comment on this important legislation.

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